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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1375

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID T. SEARLS
J. EVANS ATTWELL
2100 First City National Bank Building
Houston, Texas 77002

JACK D. HEAD
P. O. Box 2521
Houston, Texas 77001

Of Counsel

LYNN R. COLEMAN
PLATT W. DAVIS III

VINSON, ELKINS, SEARLS & CONNALLY
2100 First City National Bank Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, INC., HOUSTON

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Texas Eastern Transmission Corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 20, 1969.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 414 F.2d 344. It is printed as Appendix B hereto, *infra*, pp. 27-37. The orders of the Federal Power Commission, Opinion Nos. 540 and 540-A, are published at 39 F.P.C. 630 and 40 F.P.C. 62.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1969, *infra*, p. 27. Rehearing was denied on Decem-

ber 30, 1969 (R. 793). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Does the Federal Power Commission have the power under Section 4(e) of the Natural Gas Act to deprive a natural gas pipeline company of refunds resulting from the disallowance of supplier rate increases paid by such pipeline company but not passed on to its customers?

2. May the Commission deprive a pipeline of supplier refunds applicable to a past period simply because the Commission-approved rates charged by the pipeline during such past periods are subsequently determined to have produced excessive earnings?

3. Assuming the Commission is not required by Section 4(e) to order payment of supplier refunds to the pipeline which paid the increased supplier rates, is the Commission required to distribute such refunds in accordance with equitable principles as enunciated by this Court in *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949)?

4. After changing the established disposition of refunds, may the Commission apply its "newly enunciated policy" to past periods during which natural gas companies, their customers and the Commission have entered into and partially performed contracts in reliance on the previously established disposition of refunds?

5. May the Commission in a subsequent proceeding change the disposition of refunds previously specified in settlement contracts and final Commission orders disposing of supplier rate increases?

STATUTE INVOLVED

The statutory provision involved is Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), which is printed in Appendix A, *infra*, pp. 25-26.

STATEMENT

Established Disposition of Refunds Under Section 4(e)

Where a supplier of natural gas who is subject to the jurisdiction of the Federal Power Commission files a rate increase, Section 4(e) of the Natural Gas Act permits such rate increase to be put into effect and collected subject to refund from the pipeline-purchaser. If this is done, the Commission is empowered by Section 4(e) at the culmination of proceedings conducted thereunder "to order such [supplier] to refund, with interest, the portion of such increased rates or charges by its decision found not justified." For more than 25 years after the Act was passed in 1938, the Commission uniformly ordered all such refunds paid to the pipeline which had paid the increased supplier rates (R. 734). Where the pipeline, in response to the supplier rate increases, filed its own "tracking" rate increases, the Commission, as part of the pipeline's rate proceeding, would frequently require "flow through" of refunds received by the pipeline as a result of Commission disallowance of its supplier's rate increase. However, if the pipeline absorbed the supplier rate increases (by not passing them on to its customers in the form of increased rates), the Commission regularly ordered the supplier to make refunds to the pipeline which retained such refunds (R. 413, 417).

This case is one of first impression in which the Commission has changed the consistent interpretation of its powers under Section 4(e) over the disposition of refunds

and has retroactively applied this newly found statutory power to past periods. In particular, the Commission in 1968 ordered Texas Eastern to flow through to its customers refunds resulting from the disallowance of supplier increases admittedly absorbed by Texas Eastern during the years 1961 through 1964 (R. 734).

Texas Eastern's 1961 Settlement

During the years 1961 through 1964, Texas Eastern charged its customers the rates fixed by the Commission in its order issued January 25, 1961 approving a settlement of two Texas Eastern rate increase proceedings (R. 290-334). By this 1961 settlement Texas Eastern agreed to a limited flow-through obligation with respect to refunds which might be generated by the disallowance of rate increases then being collected by its suppliers. It was agreed (R. 307-310) that Texas Eastern would flow through to its customers any supplier refunds (i) which were attributable to gas purchased during the period the settlement rates remained in effect *and* (ii) which resulted from the disallowance of any of the 520 specified supplier rate increase proceedings included in the cost of service used to fix the settlement rates (R. 318, 320). Conversely, Texas Eastern had no obligation under the 1961 settlement to flow through any refunds it was entitled to receive as a result of the disallowance of (i) any of the 173 additional supplier rate increase proceedings which had been filed and were pending but which were not included in the 1961 settlement cost of service (R. 406-07), or (ii) supplier rate increases filed subsequent to the settlement.

Events After Texas Eastern's 1961 Settlement

After approval of Texas Eastern's 1961 settlement, its suppliers filed and collected, subject to refund, additional rate increases which resulted in increased gas costs to

Texas Eastern for the calendar years 1961 through 1964 of approximately $20 million in excess of the costs used to establish the 1961 settlement rates (R. 410, 576). Texas Eastern did not file a rate increase to pass on any of these additional costs to its customers but continued to charge its customers the rates fixed by the 1961 settlement (R. 412).

Certain of these supplier rate increases were disallowed and refunds required. As a result, until July 1964, Texas Eastern received approximately $17.3 million in refunds as a result of the disallowance of such supplier rate increases. Approximately $11.6 million of this amount was attributable to the disallowance of supplier rate increases included in the settlement cost of service and was flowed through by Texas Eastern to its customers in accordance with the provisions of the 1961 settlement (R. 416). The remaining balance of $5.7 million represented refunds resulting from supplier rate increases not included in the settlement cost of service (R. 410).[1] This amount was retained by Texas Eastern in accordance with the understanding of the parties to the 1961 settlement and the Commission's uniform disposition of refunds resulting from the disallowance of supplier rate increases (R. 413).

Texas Eastern's customers gave written releases acknowledging that the refunds disbursements made by Texas Eastern were in accordance with the 1961 settlement (R. 340, 346, 368, 378). Likewise, the Commission advised Texas

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[1] The $5.7 million of refunds retained by Texas Eastern should be compared to the $20 million of supplier rate increases absorbed during the period 1961-1964 (R. 575). In the orders under review, the Commission stated that the supplier refunds at issue totalled $10 million (R. 735). Therefore, even if Texas Eastern were to receive and retain all of the supplier refunds, it would still have absorbed a net increase of $4.3 million.

Eastern that such refund dispositions constituted satisfactory compliance with the Commission's order approving the 1961 settlement (R. 341, 347, 352, 358, 362, 369).

Steps Leading Up to Change in Disposition of Refunds Under Section 4(e).

In July 1964, the Commission abruptly announced that it was reconsidering the disposition of refunds it had consistently followed for more than 25 years and that in instances where a pipeline claimed the right to retain supplier refunds, the Commission would prescribe the procedure "for determining the relative rights to such funds of such pipelines or its customers". *Humble Oil & Refining Co.*, 32 F.P.C. 49 (1964). Subsequently, the Commission disallowed additional supplier rate increases paid and absorbed by Texas Eastern during the years 1961-1964, but directed the suppliers to retain the refunds payable to Texas Eastern pending further Commission order. The Commission likewise directed suppliers to halt payment to Texas Eastern of any additional refunds specified in settlement contracts and final orders previously issued by the Commission.[2]

On October 4, 1965, the Commission instituted proceedings in Docket RP66-12 to determine whether:

> "Texas Eastern is entitled to receive and retain any of the sums of money collected from Texas Eastern by its jurisdictional suppliers which the suppliers have been directed to refund with interest, but which, pur-

[2] During 1961 and 1962, Texas Eastern had entered into and the Commission approved settlement contracts disposing of certain rate increases filed and collected by Texas Gas Transmission Corporation (26 F.P.C. 924) and United Gas Pipe Line Company (27 F.P.C. 504). These settlement contracts directed the suppliers to pay specified future refunds to Texas Eastern. In 1963, the Commission had issued a final order disposing of rate increases filed and collected by Southern Natural Gas Company wherein Southern Natural was directed to pay specified future refunds to Texas Eastern (29 F.P.C. 323).

suant to the orders referred to . . . , they have been directed to hold pending further order of the Commission" (R. 672).

Texas Eastern sought review of the Commission's refund retention orders and its order instituting the proceeding in Docket RP66-12. The Court of Appeals for the Fifth Circuit dismissed Texas Eastern's petitions as premature. *Texas Eastern Transmission Corp.* v. *FPC*, 357 F.2d 232 (5th Cir. 1966).

The Commission's Orders

Thereafter, the Commission conducted further proceedings which culminated in Opinion 540 issued May 3, 1968 (R. 734). In its opinion, the Commission for the first time departed from the "normal practice of intermediate pipelines not under an express flow-through obligation retaining all supplier refunds" (R. 754). The Commission held that it had the power "to order disposition of the subject refunds to a person other than Texas Eastern" (R. 738). The Commission predicated this power on general statements as to its duty to protect ultimate consumers (R.745) but then admitted that under the Act it had no power to see that the refunds reached them because it did not have jurisdiction over local distribution companies subject to state regulatory authority (R. 746).

The Commission then held that in the future a pipeline's only protection against supplier increases would be to file its own "tracking" rate increase under Section 4. Obviously, it was too late for Texas Eastern to file "tracking" rate increases with respect to supplier rate increases it had paid during 1961 through 1964. Even so, the Commission held that despite Texas Eastern's absorption of these supplier rate increases, it was not entitled to any of the refunds because the Commission approved rates charged its customers during the years 1962-1964 had

resulted in Texas Eastern earning more than a reasonable rate of return on its investment during such past period (R. 755).[3]

The Commission recognized that certain settlement contracts and prior Commission orders — relating to supplier rate proceedings — specified payment of certain refunds to Texas Eastern. However, the Commission held that these contracts and orders were not a bar to the exercise of its "newly enunciated policy" because they were concerned with the lawfulness of the supplier rates there in issue and not the persons ultimately entitled to retain the refunds specified therein (R. 379).

The Commission disavowed any power to determine the equity of the claims of Texas Eastern, its customers and the consuming public to the refunds resulting from the disallowance of these past supplier rate increases and to distribute them in accord with equitable principles, stating (R. 759):

> "Unlike the courts operating pursuant to their equitable powers in cases like *Interstate, supra,* we have no authority to enforce potential consumer rights in either the direct sales or the local distribution situation."

[3] The Commission's orders did not reveal what rate of return it considered reasonable for Texas Eastern for these past three years. In its order instituting the proceedings in Docket RP66-12, the Commission had noted that 6.5% was the highest rate of return it had previously allowed a pipeline and that according to figures attached to the order Texas Eastern enjoyed an "apparent excess in revenues" during the years 1962, 1963 and 1964 (R. 669-673). In response to the Commission's order, Texas Eastern, while denying the relevance of the rate of return generated by its past firm rates, filed a report showing that in each of the years 1962, 1963 and 1964 it had earned a rate of return substantially less than 6.5% (R. 675-77). In the Docket RP66-12 proceedings the Commission Staff introduced evidence to show that Texas Eastern's past firm rates had resulted in a rate of return in excess of 6.25% for the years 1962, 1963 and 1964 (R. 586).

Accordingly, the Commission ordered the refunds paid to Texas Eastern's distribution company customers even though a substantial portion of the refunds will not be flowed through to consumers but will be retained by such distribution company customers.[4]

On rehearing, Texas Eastern pointed out that refunds applicable to the year 1961 were also in issue and that there was no evidence concerning the rate of return earned by Texas Eastern during 1961 or what would have been a reasonable rate of return for that year. In Opinion 540-A, the Commission admitted that "there is no evidence as to the rate of return Texas Eastern earned that year" but held that Texas Eastern was not entitled to any of the 1961 refunds because it failed to "introduce evidence to show that Texas Eastern earned less than a reasonable rate of return in 1961" (R. 773-774).

Decision of the Court Below

The court below affirmed the orders of the Commission. However, it is evident from the court's opinion that it believed that affirmance of the Commission's orders would result in further proceedings before the Commission for the purpose of (i) assuring that the refunds would, to the extent possible, be passed on to the ultimate consumers and (ii) determining the equities between Texas Eastern and its distribution company customers to that portion of the refunds which would not or could not be flowed through

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[4] Extensive surveys by the Commission have revealed that only a limited portion of refunds ordered by the Commission ever reach the ultimate consumers. For example, the Commission's surveys show that UGI Corporation, a stockholder owned utility which operates the Philadelphia Gas Works, an intervenor in this proceeding, retained more than 58% of the refunds it received between July 1961 and July 1964 as a result of Commission orders (R. 517-521).

to the ultimate consumers. In this regard, the court below stated (414 F.2d at 350, p. 37 *infra*):

> "Texas Eastern lost its claim on the merits as against the consumers but it may justly complain that its equities may exceed those of its distributor-customers in the event the refunds are not flowed through to the consumer. The matter has been remanded by the Commission to the hearing examiner for disposition of the refunds. The examiner held, and the Commission agreed, that '. . . In line with the *Interstate* case further proceedings are necessary to insure that the sums here at issue, to the extent possible, be passed on to the ultimate consumers in accordance with the objectives of the Natural Gas Act.'"

Texas Eastern timely filed a petition for rehearing. The court below requested the Commission to file a response (R. 783).[5] In its response, the Commission candidly conceded that it did not intend to conduct further proceedings to effect an equitable distribution of the refunds. The Commission again acknowledged that its orders would produce "an inequitable result" because a substantial portion of the refunds would not be flowed through to consumers but would be retained by Texas Eastern's customers (R. 784). The Commission simply reiterated "that it, unlike the courts, had no authority to enforce consumer rights" (R. 784). The court below requested the Commission to file an additional brief on the question of whether Texas Eastern was entitled to certain of the refunds based on the provisions of settlement contracts and prior orders of

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[5] Rule 40 of the Federal Rules of Appellate Procedure provides *inter alia:*

> "No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request."

the Commission (R. 788). The Commission again recognized that these settlement contracts and final orders specified payment of the refunds to Texas Eastern but denied that they gave Texas Eastern any vested right to retain the refunds (R. 789). After considering the matter for more than five months and requiring two different sets of briefs, the court below summarily denied rehearing on December 30, 1969 (R. 793).

REASONS FOR GRANTING THE WRIT

1. Importance and Impact.

This case presents four important questions as to the scope and proper exercise of the Commission's power over the disposition of refunds ordered under Section 4(e) of the Natural Gas Act. The fifth question has widespread significance because of the Commission's use of the settlement process to cope with its staggering administrative burden.

The industry-wide importance of these issues has been recognized by all parties from the inception of this proceeding. Thus, in dismissing as premature earlier petitions to review filed by Texas Eastern, the court below noted (357 F.2d at 232-33):

> "The novel orders of the Federal Power Commission attacked in these proceedings mark the Commission's decision to take a new and close look at its jurisdiction over refunds generated under Section 4(e) of the Natural Gas Act."

Likewise, in the orders under review, the Commission stated (R. 762-63):

> "As all parties have recognized in their briefs, this proceeding involves an issue of first impression as a contested matter before the Commission; it is a 'novel' issue without administrative precedent."

Thus, it is clear that the questions presented by this petition transcend the instant case and warrant review by this Court because of their industry-wide implications and vital importance to proper administration of the Natural Gas Act.

2. Lack of Statutory Power.

In the orders under review the Commission reversed the long standing interpretation of its authority under Section 4(e) of the Act over the disposition of supplier refunds. To justify its newly found statutory power, the Commission held that "the literal wording of the Act does not direct to whom the subject refunds must be paid" (R. 744). In so holding, the Commission overlooked the accounting provision of Section 4(e) which requires a supplier of natural gas which has increased its rates "to keep accurate accounts in detail of all amounts received by reason of such increase *specifying by whom and in whose behalf such amounts were paid.*" [6] The court below acknowledged the accounting provision of Section 4(e) but condoned the Commission's new interpretation of its statutory authority on the ground that "the purpose of the Act [is] to protect ultimate consumers of natural gas" (414 F. 2d at 347, *infra*, p. 32).

The orders of the Commission and the decision of the court below are contrary to the plain meaning of the statute, are in conflict with this Court's *Sunray* decision,[7] and have already destroyed the rate stability heretofore enjoyed by consumers. In *Sunray* one of the questions was whether the Commission had the power under Section 4(e) to require a natural gas company to make refunds below the in-line price at which sales of gas had been certificated.

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[6] All emphasis is supplied unless otherwise indicated.

[7] *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968).

This Court held that the previously certificated rate constituted a floor or lower limit on the Commission's refund power. In so holding, this Court relied heavily on the accounting provision of Section 4(e) and clearly indicated the proper guidelines for the construction of that statutory provision:

> "We adhere to the dicta in *Callery* and *Sunray Mid-Continent. That outcome comports better with the language of § 4(e) than does the alternative.* It is true that § 4(e) in terms gives the Commission power to refund 'the portion of such increased rates or charges' found to be excessive, and *does not expressly limit* the refund to the rate increase or increment. However, *the accounting provision,* which appears earlier in the same sentence, requires that the producer account only for the 'amounts received by reason of such increase'. If it had been intended that the refund obligation should extend to greater amounts, *the accounting requirement* logically should have extended to them also." 391 U.S. at 23-24.

Application of such guidelines to the present case removes any doubt that the subject refunds should be paid to Texas Eastern instead of its distribution company customers.[8] In particular, the accounting provision of Section 4(e) makes it clear that refunds are to be paid to the one who paid the increased rates. Otherwise there would be no reason to require a supplier of natural gas which had increased its rates "to keep accurate accounts in detail of all amounts received by reason of such increase, *specifying by whom and in whose behalf such amounts were paid.*" Moreover, in *Sunray* this Court was well aware of its previous statements as to the general purpose of the Act,

[8] It is undisputed that those customers did not pay any of the excessive supplier rates which generated the refunds but were charged only the rates which the Commission had fixed for Texas Eastern during the years 1961-1964.

which were relied on by the court below, but nevertheless adopted a construction of Section 4(e) which was consistent with the plain meaning of the statutory language even though such construction resulted in a reduction of refunds that could have been ordered.

Corrective action by this Court is required not only because of the erroneous construction of Section 4(e) by the court below but also because of the "great proliferation of supplier rate increases . . . and concomitant increase in the Commission's work load" (R. 753) which have resulted from the Commission's "newly enunciated policy" with respect to the disposition of supplier refunds. Despite the Commission's prediction to the contrary (R. 753), it has been besieged with a multitude of pipeline rate increases since the issuance of Opinion 540. As a result, consumer price stability has been destroyed. Former FPC Commissioner William R. Connole, who was well known for his consumer views, foresaw this result when he testified that (R. 446):

> "Unless pipelines could be sure that they were entitled to receive and retain any refunds resulting from supplier increases which they elect to absorb they would be required to file a rate increase with each increase filed by every supplier. The result would be administrative chaos."

3. Prohibition Against Reparations.

The Commission ordered the subject refunds paid to Texas Eastern's customers because of its finding that "in each of the three years in issue Texas Eastern in fact earned substantially more than a reasonable rate of return on its investment" (R. 755). The awarding of the refunds to Texas Eastern's customers on account of the level of earnings generated by Texas Eastern's past firm rates violates the prohibition against reparations and conflicts with this Court's decisions in *Montana-Dakota Util. Co.* v. *North-*

western Pub. Serv. Co., 341 U.S. 246 (1951) and *FPC* v. *Sunray DX Oil Co., supra*, and the decision in *Hope Natural Gas Co.* v. *FPC*, 134 F.2d 287, 319 (4th Cir. 1943), *rev'd on other grounds*, 320 U.S. 591, 618. The court below sought to sidestep the reparations question by holding that if the Commission has "the power of disposition over the refunds then the question becomes one of entitlement and not of reparations" (414 F.2d at 349, *infra* p. 35). However, this holding begs the question for if the Commission does not have the power to award reparations it cannot do so in the guise of determining entitlement to refunds under Section 4(e).

In each of the foregoing cases the court made it crystal clear that the Commission does not have the power to award damages, refunds or reparations to Texas Eastern's customers simply because the firm, just and reasonable rates charged those customers result in a rate of return in excess of the rate of return the Commission now determines should have been earned. Thus, in its latest pronouncement on reparations, this Court stated:

> " It seems incontestable that if a producer consistently sells gas at the price specified in a final, permanent certificate, and does not attempt to increase his price, *the Commission may not order him to make refunds simply because the just and reasonable rate for his area turns out to be below the in-line price. This would amount to a reparation order and this Court has repeatedly held that the Commission has no reparation power.*" *FPC* v. *Sunray DX Oil Co.*, 391 U.S. at 24.

4. Conflict With Interstate and Its Progeny.

The Commission made no attempt to dispose of the subject refunds in accordance with equitable principles. In this connection it is undisputed that during the years 1961-1964, Texas Eastern paid and absorbed the supplier rate

increases which generated the subject refunds. Thus, Texas Eastern's customers suffered no increased costs as a result of these supplier rate increases but were charged the same firm rates they would have been charged had there been no supplier rate increases. The Commission and the court below recognized that Texas Eastern paid and absorbed these supplier rate increases[9] but held that Texas Eastern was not entitled to the resulting refunds because of the level of its past earnings.

The refusal of the Commission and the court below to determine the relative equities of the claims by Texas Eastern and its customers is squarely in conflict with *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949) and its progeny, and is utterly inconsistent with the position taken by the Commission in another earlier proceeding. In *Interstate* the Commission had ordered Interstate Natural Gas Company to reduce its rates. The court of appeals stayed the rate reduction but required *Interstate* to pay the amount of the reduction into the registry of the court. The Commission's rate reduction was subsequently affirmed. The question then arose as to who was entitled to the amounts deposited in the registry of the court. This Court held that such amounts should be disposed of "in accord with equitable principles," 336 U.S. at 583, so as to place the parties in the position they would have occupied *but for* the stay order.[10] In this connection, the Court held that if intermediate pipeline companies which

[9] The Commision found that "it is a matter of record that during the years in question, Texas Eastern did not file increased rates" (R. 748). The court below found that: "The increases were paid and absorbed by Texas Eastern in the sense that they were not passed on by Texas Eastern to its customers in the form of rate increases." (414 F.2d at 345, *infra* p. 27).

[10] In his concurring opinion, Justice Frankfurter pointed out that "the task of the court is to place the parties in the position in which they would have been had there not been a postponement of the effective date of the rate reduction" (336 U.S. at 586).

purchased gas from Interstate had passed on the rate reduction to their customers they would be entitled to their share of the funds. Thus, Justice Douglas, speaking for the majority in *Interstate*, stated (336 U.S. at 582):

> "Moreover if the pipe-line companies [which purchased directly from Interstate] passed on to their customers the rate reduction from the date of the Commission's order (as Mississippi alleges it did), they would be entitled to a return of payments they made into the fund."

Under this same rationale, it is clear that Texas Eastern was equitably entitled to the subject refunds rather than its customers, who are in the same position as if no rate increase had ever been filed by Texas Eastern's suppliers. Having absorbed all of the supplier rate increases, Texas Eastern occupies precisely the same status as the intermediate pipelines in *Interstate*, which, during the pendency of the stay, had passed on the rate reductions to their customers.

The decision of the court below is also in conflict with the progeny of *Interstate*. The case most comparable is *Northern Natural Gas Co.* v. *FPC*, 215 F.2d 892 (8th Cir. 1954), which involved a court-ordered stay of the Commission's disallowance of certain elements of a Section 4(e) rate increase filed by Northern. The proceeding was brought by Northern's customers for distribution of the fund accumulated pursuant to the court's stay order. The court stated that its objective was to prevent a windfall or unjust enrichment. Those customers, which, like Texas Eastern here, had not passed on to consumers Northern's rate increase were held to be unconditionally entitled to reimbursement of the excessive amounts they had paid pursuant to the court's stay order. The court rejected the contention of certain distributors that entitlement to the

funds in question should be determined by a retroactive review of the level of earnings generated by past firm rates. In other words, the Eighth Circuit rejected the basis — the level of earnings generated by past rates — used by the Commission and approved by the Fifth Circuit in this case to deny Texas Eastern's right to the subject refunds.[11]

The decision below is also in conflict with *United Fuel Gas Co.* v. *FPC*, 367 F.2d 34 (4th Cir. 1966), which recognized the crucial importance of absorption of supplier rate increases in determining equitable entitlement to refunds resulting from the disallowance of supplier rate increases. In that case, the court dismissed as premature appeals from refund retention orders but pointed out that one of the reasons for its decision was that the Commission had not had an opportunity to determine whether the excessive rates had been passed on or absorbed, stating (367 F.2d at 37):

> "The court must determine who bore the burden of the excessive rates and distribute the refunds accordingly."

In this case there is no question as to "who bore the burden of the excessive rates". They were paid and absorbed by Texas Eastern and the refunds should have been distributed accordingly.

Finally, the orders under review and the decision of the court below are in conflict with the position previously taken by the Commission in *Texaco Inc.*, 27 F.P.C. 847 (1962). In that case, suppliers had filed Section 4 rate increases which were subsequently disallowed. In proceedings to determine the disposition of the refunds, it was

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[11] See also *Northern Natural Gas Co.* v. *FPC*, 245 F.2d 447, 449-50 (8th Cir. 1957); *Northern Natural Gas Co.* v. *FPC*, 254 F.2d 466 (8th Cir. 1958).

contended that retention of the refunds might result in a windfall to the recipient pipelines. The Commission rejected this contention and held that the pipelines were entitled to the refunds because they had not passed on the supplier increases but had absorbed such increases. In this connection, the Commission found (27 F.P.C. at 849-50):

> "The second branch of Union's argument is that the Commission, in considering the equities, failed to take into account the possibility that the refunds might be a windfall to the recipient pipelines. The fact is, however, that before issuing the March 5 order, the Commission took steps to verify that its action would not yield the windfall. The records of the Commission confirm representations made by Transco in these proceedings to the effect that the *increased costs* attributable to the gathering tax *were never passed on in the form of higher rates.* Having *absorbed* the tax, Transco will not be unjustly enriched if it is allowed to retain amounts refunded to it pursuant to our March 5 order."

Thus, the orders of the Commission and the decision of the court below conflict with prior decisions at every level of the judicial ladder — from the Commission to this Court. Such conflict is clear and irreconcilable and should be resolved by the granting of certiorari.

5. Illegal Retroactive Application of a Change In Established Disposition of Refunds Under Section 4(e).

As previously noted, during the years 1961 through 1964, as a matter of course, the Commission required the payment of supplier refunds to pipelines which had paid increased rates and permited these pipelines to retain such refunds if they had not filed tracking rate increases. No attempt was made to determine the pipelines' entitlement

to such refunds based on a retroactive review of their past firm rates. In the orders under review, the Commission did not deny that this had been its past practice with respect to the disposition of refunds. In fact, it recognized the "normal practice of intermediate pipelines not under an express flow-through obligation retaining all supplier refunds" (R. 754). However, the Commission changed its "normal practice" and retroactively applied such change to refunds relating to "Texas Eastern's suppliers' rate increases during the years 1961-64 inclusive" (R. 735).

The court below recognized the Commission's past practice, 414 F.2d at 346, *infra* p. 29, but sanctioned its new policy on the ground that the Commission "was not precluded from adopting the new policy" (414 F.2d at 349, *infra*, p. 34).

Clearly, the court below misunderstood Texas Eastern's complaint and the error in the Commission's action. Texas Eastern's argument in this instance was not that the Commission was precluded from adopting a new policy as to the disposition of refunds — but rather that the Commission could not retroactively *apply* such new policy to Texas Eastern. In this connection, it should be emphasized that this was a situation "where an agency alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry that it regulates". *NLRB* v. *Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1966). In that case, the NLRB was reversed on a procedural point, but Judge Friendly noted that since the established rule had been considered consistent with the statutory design for 15 years, the "ill-effect of the retroactive application of a new standard so far outweighed any demonstrated need for immediate application to past conduct as to render the board's action arbitrary." The "antipathy to retroactive law making by courts and legis-

latures has deep historical roots" because "it tends to destroy predictability and to undercut reliance — both important aims of the law". *Leedom* v. *International Bd. of Elec. Workers,* 278 F.2d 237, 240 (D.C. Cir. 1960).

The Commission's retroactive application of its new policy in this case is puzzling as well as inequitable; puzzling, because the Commission has uniformly made policy changes prospective in the interest of administrative fairness. Thus, the Commission refused to apply retroactively its new principles concerning the treatment of liberalized depreciation prior to the date on which the new policy was announced. The Commission's action was affirmed in *City of Chicago* v. *FPC,* 385 F.2d 629 (D.C. Cir. 1967), *cert. den.,* 390 U.S. 945, where Judge Leventhal stated:

> "Explaining why its ruling was not made retroactive to the effective date of Natural's rate increase, the Commission stated 'that in *Alabama-Tennessee* we were announcing a new policy and overruling previous decisions. It was therefore not equitable, contrary to the contentions of Chicago, to make our determination effective before February 3, 1964, but on that date the industry was informed of the new policy, and it was appropriate that refunds should be ordered from then.'" 385 F.2d at 641.

Retroactive application was particularly unfair in this case because Texas Eastern had irretrievably changed its position and entered into and partially performed contracts in reliance upon the established disposition of refunds. The evidence is clear and undisputed that Texas Eastern would not have agreed in the 1961 settlement to flow through refunds resulting from the disallowance of supplier rate increases included in the settlement cost of service if it had not believed that, pursuant to "the then normal practice", it would be entitled to receive and retain refunds resulting from the disallowance of any subsequent

supplier rate increases it paid and absorbed (R. 417-18). Likewise, Texas Eastern would not have agreed to the settlement of certain supplier rate increases if it had not believed that it would be entitled to receive and retain specified refunds which the suppliers were required to make. Clearly, this is a case where the Court should "intervene to protect against unfairness resulting from an administrative adjudication which retroactively changes law on which a party has relied". 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 17.09, at 544.

The unfairness is compounded by the discrimination inherent in the Commission's retroactive application of its new policy. The Commission used its so-called "normal practice" to dispose of substantial refunds payable to other pipelines during the years 1961-1964. If these pipelines had absorbed the supplier increases, they were allowed to retain the resulting refunds. Now, the Commission has singled out Texas Eastern for a difference in treatment not justified by a difference in conditions. Accordingly, certiorari should be granted to avoid discriminatory application of the Commission's "normal practice" as well as the inequity inherent in the retroactive application of its "newly enunciated policy."

6. Adverse Impact On Settlement Contracts.

Ever since this Court's *Phillips* decision,[12] the Commission has found settlements indispensable to the proper administration of the Natural Gas Act. The need to promote settlements was summarized in *Texas Eastern Transmission Corp.* v. *FPC*, 306 F.2d 345 (5th Cir. 1962), *cert. den.* 375 U.S. 941, as follows:

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[12] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

> "For Commission approved voluntary settlements are an important and desirable mechanism as the Commission undertakes the staggering burden of dealing with the ceaseless flow of the ever more complicated problems facing an inadequate staff as a result of the celebrated 1954 Phillips decision. Consequently, settlements should be encouraged, not discouraged."

In 1961 and 1962, Texas Eastern agreed to and the Commission approved contracts for the settlement of supplier rate increases which Texas Eastern had paid but not passed on to its customers.[13] Neither the Commission nor the court below denies that these settlements provided for the payment of future refunds to Texas Eastern. Nor do they dispute the fact that during the intervening years substantial refunds were paid to Texas Eastern pursuant to these settlement contracts. However, the court below sanctioned the Commission's change in the disposition of refunds specified in these settlements on the ground that they were not concerned with entitlement to the refunds ordered. This is inconceivable since the bulk of the settlement contracts and related Commission orders were devoted to meticulously detailing the rights of Texas Eastern and other parties to refunds.[14] These provisions would have been meaningless and Texas Eastern would never have agreed to the settlement contracts if the designated recipients of refunds could be changed at the whim of the Commission.

If the settlement process is to work effectively, then settlements must be binding on all parties. The Commission simply cannot change the terms of settlement contracts "out of the thoroughly commendable and understandable feeling that unless that is done the result is not as good as it ought to have been." *Texas Eastern Transmission*

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[13] See note 2, *supra*, and discussion at p. 10, *supra*.

[14] See Appendix to Texas Eastern's Petition for Rehearing filed with the court below (R. 782).

Corp. v. *FPC, supra,* 306 F.2d at 348. In the present case the change in the specified disposition of refunds is clearly erroneous and will discourage future rate settlements unless corrected by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

David T. Searls
J. Evans Attwell
Jack D. Head

Attorneys for Petitioner

Of Counsel

Lynn R. Coleman
Platt W. Davis III

Vinson, Elkins, Searls & Connally
2100 First City National Bank Building
Houston, Texas 77002

APPENDIX A

Section 4(e) of the Natural Gas Act, 52 Stat. 822 (1938); 76 Stat. 72 (1962); 15 U.S.C. § 717c(e).

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect, and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased

rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26477

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION TO REVIEW ORDERS OF THE FEDERAL POWER COMMISSION

(JUNE 20, 1969)

Before BELL and THORNBERRY, Circuit Judges and CHOATE, District Judge.

BELL, Circuit Judge: This case involves the disposition of refunds resulting from the disallowance under § 4(e) of the Natural Gas Act, 15 USCA, § 717(c)(e), of rate increases collected during the period 1961-64 from Texas Eastern by its suppliers. The increases were paid and absorbed by Texas Eastern in the sense that they were not passed on by Texas Eastern to its customers in the form of rate increases. The refunds, held in escrow by the suppliers and amounting to more than $10,000,000,

were claimed by Texas Eastern. The claim was rejected by the Commission on the premise that the refunds should flow through to the distributor customers of Texas Eastern for the benefit of the consuming public.

The sole issue before the Commission was the entitlement of Texas Eastern to the refunds. Texas Eastern, an interstate pipeline carrier of natural gas, purchases gas from producer-suppliers. It, in turn, sells to distributors who sell to the consumer. The producer-suppliers are not involved, their rate increases having already been disallowed; hence, the creation of the refunds. On the entitlement hearing, Texas Eastern, of necessity but indirectly, was asserting such equities as it had to the refunds as against the right of consumers to just and reasonable rates.

In *Texas Eastern Transmission Corp.* v. *Federal Power Commission,* 5 Cir., 1966, 357 F.2d 232, the court dismissed, on the ground of prematurity, petitions for review of the Commission orders directing the suppliers to retain the refundable amounts until the question of entitlement as between the pipeline and the customers of the pipeline could be determined. Judge Wisdom, speaking for the court, adverted to the novelty of the question presented as follows:

> "The novel orders of the Federal Power Commission attacked in these proceedings mark the Commission's decision to take a new and close look at its jurisdiction over refunds generated under Section 4(e) of the Natural Gas Act. . . . Does the statute permit and does sound policy require the Commission to control the disposition of refunds? To what extent may the Commission require the flow-through of refunds from natural gas producers to jurisdictional pipeline companies to non-jurisdiction local distributors and, indirectly, to the ultimate consumers for whom, the

> Supreme Court has said, the Act provides a 'complete, permanent, and effective bond of protection'? . . . To obtain the answers to these and related questions, the Commission ordered United Gas Pipe Line Company to retain certain refunds, reflecting excessive earnings, 'subject to further order of the Commission [after a hearing] directing the disposition of those amounts.' These retention orders state that their purpose is to enable the Commission to determine 'whether United's immediate customers, or the customers of such customers, are legally and equitably entitled to retain the refunds'." 357 F.2d at 232-233

The hearing and orders which followed that decision form the subject matter of the petition to review now before us. The Commission's approach was two-fold to the extent that it was concerned with refunds and thus with past activity as well as with prospective procedures.

Under past policy of the Commission, when a supplier rate increase was disallowed, the refund went to the pipeline unless the pipeline had increased its rates in response to the supplier increase. Where the pipeline had increased its rates under these circumstances, it would be required to flow through refunds to its customers. The policy adopted in these proceedings, for prospective use, was the requirement that a pipeline, to claim supplier increase refunds, must file tracking rate increases. Since Texas Eastern was not, at the time the Commission entered its refund orders against the suppliers, able to file tracking rate increases for the years 1961-1964, the Commission afforded it an opportunity to make a factual showing of entitlement to the refunds in question.

The burden imposed on Texas Eastern evolved into showing that it earned less than a reasonable rate of return in the years in question. No proof was offered for the year 1961 and the proof for the years 1962-1964 was such

that the Commission concluded that Texas Eastern earned more than a reasonable rate of return. Texas Eastern's claim was thus denied.

The Commission justified its policy departure on the ground that the primary purpose of the Natural Gas Act was to protect ultimate consumers of natural gas from excessive charges and that the Act must be applied so as to protect their collective interests. Thus, the Commission said: " . . . we find that under the Act the ultimate consumers of natural gas are proper beneficiaries of our disposition of the subject refunds." Texas Eastern points to the haitus in power in that the Commission lacks jurisdiction to see that the refunds will go to ultimate consumers; that its authority can extend only so far as to give the refund to distributors; and that there is no assurance that ultimate consumers will in any way benefit. Thus, Texas Eastern argues that the dispute is between itself and its distributor-customers, and that as between these two all equities lie with it.

Of the several issues presented, the foremost is directed to the question of the power of the Commission to order these refunds. This, in turn, depends on a statutory base. Assuming a statutory base, a further issue is whether the Commission was barred from adopting the new policy by its past actions. Texas Eastern also asserts that as to the refunds under consideration, the Commission's order is barred under the reparations doctrine, and, as to some if not all of the refunds, by its 1961 settlement agreement with the Commission, and by final orders entered by the Commission disposing of certain supplier rate increases. The last issue, assuming statutory power and no bar, is whether the Commission's order, including its new refund flow through policy, was rationally based.

I.

We will first consider the question of power. We find the necessary statutory authority for the action of the Commission. The statutory language is as follows:

> " . . . Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified." 15 USCA, § 717c (e)

This statutory authority to require funds must be coupled with the fact of the overriding purpose of the Natural Gas Act to protect consumers in their purchase of gas to the end of keeping rates as low as possible. This purpose appears expressly in the Act, § (a)[1] and in the Supreme Court decisions. See, for example, *Federal Power Commission* v. *Hope Natural Gas Co.*, 1944, 320 U.S. 591, 610, 64 St.C. 281, 88 L. Ed. 333; *Atlantic Refining Co.* v. *Public Service Comm. of New York*, 1959, 360 U.S. 378, 388, 79 S.Ct. 1246, 3 L.Ed.2d 1312; *Federal Power Commission* v. *Tennessee Gas Transmission Company*, 1962, 371 U.S. 145, 154, 83 S.Ct. 211, 9 L.Ed.2d 199.

Texas Eastern argues that the statutory language must be construed in light of the accounting provision of the Act[2]

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[1] 15 USCA, § 717(c)(a).

[2] 15 USCA, § 717c(e), supra:

> ". . . to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, . . ."

and that as thus construed, it appears that refunds are to be paid to the one who is out of pocket. Thus, it is urged, since Texas Eastern paid the increased costs to its suppliers without passing such costs on to its distributors, it is the only party entitled to restitution through the receipt of the refunds. Texas Eastern finds supoprt for its accounting provision argument in *Federal Power Commission* v. *Sunray, DX Oil Co.*, 1968, 391 U.S. 9, 24, 88 S.Ct. 1526, 20 L.Ed. 2d 388, where the Supreme Court held that the Commission could not order a refund in excess of certificated rates. This was because, in reading the refund and accounting provisions of § 4 (e) together, a refund could not exceed amounts received by reason of the increase; otherwise, the court said, would be to sanction reparations. Texas Eastern urges, based on *Sunray*, that § 4 (e) and the accounting section read together, allow disposition of refunds only to those persons in whose behalf such amounts were paid. We are unable to find this restriction in the applicable language.

The Commission, for its argument, points to the legislative history of the Act which indicates that early drafts included a provision to refund to the persons in whose behalf the sums constituting the refunds were paid. This language parallels provisions of the Interstate Commerce Act, 49 USCA, § 15 (7), and the Federal Power Act, 16 USCA, § 824d (e). This provision was, however, eliminated in the final draft of the Natural Gas Act and the Commission contends that it was therefore purposely not limited to ordering refunds to the pipeline-payer. This argument lends little weight to our determination.

Our view is that the Commission was authorized to see to disposition of the refunds in question on the basis of the purpose of the Act to protect ultimate consumers of natural gas. It must be borne in mind that the Commission

created the refunds by disallowing supplier rate increases and by requiring that the sums in question be retained by the suppliers pending determination of entitlement. Texas Eastern could have filed rate increases to track the supplier increases. It chose not to do so for reasons of its own. One reason, no doubt, was that the Commission could have investigated the rates in the light of Texas Eastern's earnings.

Here the Commission afforded Texas Eastern the opportunity of justifying its entitlement to the refunds on a earnings basis without the concomitant risk of an investigation of its rates as would have been the case in the event of rate filings. This procedure was adopted to protect Texas Eastern in the face of the change in Commission policy as to disposition of refunds. This was a fair approach from the standpoint of protecting the interest of Texas Eastern and the consumer. To adopt Texas Eastern's position that it is, *ipso facto,* entitled to the refunds by virtue of having paid and absorbed them would be to countenance rate making by the producer-suppliers and Texas Eastern outside the protective ambit of § 4 (e). This approach would do violence to the statutory scheme by avoiding, to the extent that the refunds exceed a fair return to Texas Eastern, any rate regulation whatever except under § 5 of the Act. 15 USCA, § 717 (d).

Texas Eastern places heavy stress on the literal meaning of the word "refund" and urges that it can only mean repayment to the one who paid. We place stress on the fact that the statute does not expressly require this course of action and that such a narrow construction would make it impossible to give effect to the purposes of the Act. This is a classic case of filing the intersticies within the outer limits of a statute. Cardoza, The Nature of the Judicial Process, Yale U. Press., pp. 112-113. The history of the

Natural Gas Act is one of interstitial construction beginning with the *Phillips Petroleum Co.* v. *Wisconsin*, 1954, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035, when the court concluded that the Commission was empowered to regulate rates of producers. See *Sunray* supra, 391 U.S. 9, 16-18.

Our conclusion is buttressed by the rationale of *Federal Power Commission* v. *Interstate Natural Gas Company*, 1949, 336 U.S. 577, 69 S.Ct. 775, 93 L.Ed. 895, where refunds, created by the court's staying rate reductions, were ordered disbursed in accordance with equitable principles even to the extent of by-passing the gas purchasers who made the payments into the fund.

We conclude that the Commission was possessed of the necessary statutory authority. Moreover, it appears that the procedure accorded Texas Eastern to establish its right to the refund was appropriate and not lacking any element of fairness.

II.

We come next to the contention that the Commission was barred by its past actions from adopting the new refund policy. This argument runs from the proposition that the Commission had never before adopted such a policy; instead, the Commission in the past had consistently permitted all refunds resulting from the disallowance of supplier rate increases to be paid to the pipeline which paid the increased rates unless the pipeline had filed a corresponding rate increase, in which event the refunds would flow through to customers of the pipeline.

There is no merit whatever in this contention. The Commission was not precluded from adopting the new policy. The fact is that the Commission had neither adopted nor rejected the new policy. The administration of the Natural Gas Act since its enactment in 1938 has been one of grad-

ual development. See, for example, *Phillips Petroleum Co.* v. *Wisconsin*, supra; and *Sunray*, supra. As the court noted in *United States* v. *Morton Salt Company*, 1950, 338 U.S. 632, 647-648, 70 S.Ct. 357, 94 L.Ed. 401, power is not lost by being allowed to lie dormant.

Texas Eastern also asserts that the Commission's order constitutes a reparation order and is thus barred. The Supreme Court pointed out in *Sunray* that the Commission has no reparation power. 391 U.S. at 24. This is a form over substance or substance over form question. Texas Eastern's position is that the denial to it of the refunds is bound to be a reparation order since it paid the amounts which constitute the refunds. The weakness in this argument is that one must assume that Texas Eastern was entitled to the refunds in the beginning. But this begs the question. The Commission created the refunds by its order against the suppliers. If the Commission has, as we have held, the power of disposition over the refunds, then the question becomes one of entitlement and not of reparations. Cf. *Federal Power Commission* v. *Interstate Natural Gas Company*, supra, 336 U.S. at 582-583. Cf. also *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 1965, 382 U.S. 223, 229-230, 86 S. Ct. 360, 15 L.Ed.2d 284. This contention is without merit.

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We conclude also that the order was not barred by the 1961 settlement agreement between Texas Eastern and the Commission. That settlement involved supplier rate increases which are not here involved. To prevail, it is necessary for Texas Eastern to show that the agreement expressly or impliedly embraced the rate increases which gave rise to the instant refunds. We are unable to find any such coverage in the settlement agreement. It is true that some of the rate increases which gave rise to those here had been filed when the settlement agreement was consummated. That agreement, however, is restricted, as

we construe it, to other increases and the power of the Commission as it respected the rate increases giving rise to the refunds here was unabated by the agreement.

This is likewise true as to the final orders issued by the Commission in disposing of certain other supplier rate increases. These proceedings were concerned with the lawfulness of the supplier rates in issue and did not govern the entitlement questions now in issue.

III.

Lastly, we conclude that the order of the Commission was rationally based. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body". *Rochester Telephone Corp.* v. *United States,* 1939, 307 U.S. 125, 146, 59 S.Ct. 754, 83 L. Ed. 1147, 1166.

The answer to the rational basis inquiry depends, in the end, on the factual and legal basis for the Commission's order and whether it protects the ultimate consumer. There is a more than ample factual basis for the order from the standpoint of Texas Eastern having failed to justify the refund on an earnings basis.

The essence of Texas Eastern's approach is that a rational basis was lacking due to the dilemma posed by the Natural Gas Act in that the Commission has no authority over the ultimate disposition of the refunds by the distributors. The rates of the distributors are regulated by the states and whether the ultimate consumers will receive the refunds is within the province of the state regulatory bodies. *Federal Power Commission* v. *Interstate Natural Gas Company,* supra; *Central States Electric Company* v. *City of Muscatine,* 1945, 324 U.S. 138, 65 S.Ct. 565, 89 L.Ed. 801. The Commission noted the limitation on its jurisdiction in this respect but assumed that the state regulatory auhorities

would discharge their respective responsibilities to benefit consumers. It pointed out that the regulatory commissions of California and New York had made clear their intentions in this regard. The Commission's view was that it was serving the statutory purpose of the Act of benefiting ultimate consumers by placing the refunds within the jurisdiction of the state regulatory authorities so as to place them in position to benefit the ultimate consumers. The Commission could no guarantee benefits for the ultimate consumers but absent its new policy there would be no way to benefit the ultimate consumers. We conclude that this was a rational basis for the Commission refund order. It was an approach to effective Federalism within the framework and dictates of the Act.

The Commission protected Texas Eastern in the premises from the rigors of the retroactive application of a new policy by the procedure afforded it. Texas Eastern lost its claim on the merits as against the consumers but it may justly complain that its equities may exceed those of its distributor-customers in the event the refunds are not flowed through to the consumer. The matter has been remanded by the Commission to the hearing examiner for disposition of the refunds. The examiner held, and the Commission agreed, that ". . . In line with the *Interstate* case, further proceedings are necessary to insure that the sums here at issue, to the extent possible, be passed on to the ultimate consumers in accordance with the objectives of the Natural Gas Act." We have no doubt that satisfactory methods can be devised whereby the consumers will receive the benefit of these refunds. Creative federalism would teach a cooperative approach with the states to this end.

AFFIRMED.[3]

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[3] The petition to review involves the Commission's Opinion No. 540 issued May 3, 1968 and Opinion No. 540-A issued July 10, 1968.

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1375

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID T. SEARLS
J. EVANS ATTWELL
2100 First City National Bank Building
Houston, Texas 77002

JACK D. HEAD
P. O. Box 2521
Houston, Texas 77001

Of Counsel:

LYNN R. COLEMAN
PLATT W. DAVIS III

VINSON, ELKINS, SEARLS & CONNALLY
2100 First City National Bank Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, INC., HOUSTON

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Texas Eastern Transmission Corporation, has heretofore filed a Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on June 20, 1969. In accordance with Rule 23(i) of this Court, Texas Eastern submits as a supplement to Appendix B of said petition copies of the orders of the Federal Power Commission, Opinion Nos. 540 and 540-A, which were affirmed by the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,
DAVID T. SEARLS
J. EVANS ATTWELL
JACK D. HEAD
Attorneys for Petitioner

Of Counsel:

LYNN R. COLEMAN
PLATT W. DAVIS III
VINSON, ELKINS, SEARLS & CONNALLY
2100 First City National Bank Building
Houston, Texas 77002

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UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners:

Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Refunds - Flow-through

Texas Eastern Transmission Corporation

Docket No. RP66-12

OPINION No. 540

OPINION AND ORDER
MODIFYING INITIAL DECISION
(Issued May 3, 1968)

BAGGE, Commissioner:

FACTS

This proceeding was instituted by an Order issued on October 4, 1965,

> to determine the extent to which, if any, Texas Eastern is entitled to receive and retain any of the sums of monies collected from Tex-

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> as Eastern by its jurisdictional suppliers which the suppliers have been directed to refund with interest, but which pursuant to [Commission] orders . . . , they have been directed to hold pending further order of the Commission.[1]

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* These numbers represent pages in the Record to which Texas Eastern's Petition For Writ of Certiorari is referenced.

[1] 34 F.P.C. 1099, 1101-02 (1965).

The sums which have been accumulated pursuant to these orders now exceed $10,000,000 and relate to Texas Eastern's suppliers' rate increases during the years 1961-64 inclusive. Throughout this period, Texas Eastern charged its customers rates established in a settlement agreement approved by Order of the Commission on January 25, 1961.[2]

On December 27, 1965, Texas Eastern filed a petition in the United States Court of Appeals for the Fifth Circuit seeking review and stay of the October 4, 1965 Order. It argued that the Commission has no statutory authority to allocate refunds; that the retention orders violate express provisions of prior orders and related settlement agreements entitling the petitioner to receive and retain the refunds for its own benefit; that petitioner did not pass on to its customers United's rate increases and that therefore

it should not have to pass on refunds representing the rate increases; that the Commission's orders requiring Texas Eastern to reduce its rates for past periods constitute retroactive ratemaking. In response, the Commission filed a motion to dismiss Texas Eastern's petition as premature. On February 10, 1966, the Court dismissed the petition and denied the stay, stating:

> In short, the state of the law, as well as the procedural posture of the controversy, argues strongly for judicial hands off until the Commission has, in the first instance, decided where it wants to go and what it wants to do with refunds.[3]

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[2] 25 F.P.C. 172 (1961).

[3] Texas Eastern Transmission Co. v. F.P.C., 357 F.2d 232 (5th Cir. 1966).

Hearings then commenced September 19, 1966, and concluded October 13, 1966. Thereafter, Examiner Alvin A. Kurtz issued an initial decision, the thrust of which is reflected in the following finding and conclusion:

> The evidence in this proceeding and the applicable law do not support Texas Eastern's claim of entitlement to the contested refunds. In line with the *Interstate* case, further proceedings are necessary to insure that the sums here at issue, to the extent possible, be
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> 737
>
> passed on to the ultimate consumers in accordance with the objectives of the Natural Gas Act.[4]

Exceptions to the Examiner's decision were filed by Texas Eastern, Manufacturers Light and Heating Company (Manufacturers), The Ohio Fuel Gas Company (OFG), and The Independent Natural Gas Association of America (INGAA). Briefs in opposition thereto were filed by The People of the State of California and the Public Utilities Commission of the State of California (California), Public Service Commission of the State of New York (New York), Brooklyn Union Gas Company (Brooklyn Union), Philadelphia Gas Works Division of the United Gas Improvement Company (UGI), and the Commission Staff. Oral argument was heard on October 9, 1967.

In briefs on exceptions and at oral argument, Texas Eastern and its supporters, Manufacturers, OFG, and INGAA, argued that the Commission has no power to order disposition of the subject refunds as the Examiner has done, that the Examiner's disposition of the subject refunds constitutes retroactive ratemaking, that Texas

[4] Initial Decision, p. 13.

Eastern is "equitably entitled" to the subject refunds, and that Texas Eastern is entitled to the subject refunds under the 1961 settlement agreement and various Commission orders.

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HOLDING

We agree with the Examiner's conclusion that Texas Eastern has not established entitlement to all of the subject refunds. Accordingly, with the additional findings and modifications expressed herein with respect to the proper disposition of the subject refunds, and to the extent consistent herewith, we adopt the initial decision as our own.

THE ACT: PLAIN MEANING AND LEGISLATIVE HISTORY

Texas Eastern, Manufacturers, OFG, and INGAA except to the Examiner's finding that the Commission has power to order disposition of the subject refunds to a person other than Texas Eastern. They argue that neither the Natural Gas Act (Act) nor the courts' interpretation of it predicates a basis upon which that power may be exercised. California, New York, Brooklyn Union, UGI, and Staff, on the other hand, contend, and we agree, that the Commission has such power.

Texas Eastern, citing judicial and lexical definitions, argues that the plain meaning of the word "refund" intrinsically denotes repayment to the person who paid. That argument

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is not persuasive in the context of this proceeding. The cited definitions stem from contexts other than the Natural

Gas Act. To rely upon them as conclusive of Congress' intent herein would lose sight of the fact that we are concerned with the term "refund" as a concept and practice indispensable to effective and meaningful rate regulation under the Act.

Even in situations where statutory terms are plain, our examination of the canons of statutory construction employed by the courts makes it "perfectly clear that if the literal import of the words is not consistent with the legislative intent . . . the words of the statute will be modified by the intention of the legislature." 2 Sutherland, *Statutory Construction*, 333. The leading case of *Gray* v. *Powell*, 314 U.S. 402 (1941), comports with this canon and sets forth the proposition "that courts, rather than exercising an independent judgment when reviewing an administrative application of statutory term to undisputed facts, should affirm the administrative decision if it has a rational basis." Gellhorn & Byse, *Administrative Law*, 512. See also *N.L.R.B.* v. *Hearst Publications*, 322 U.S. 111 (1944). In applying the statutory term "refund" to the undisputed facts of this proceeding, it is our responsibility to effect policies which further the Congressional standard of the public interest. See *Atlantic Refining Co.* v. *Pub. Serv. Com-*

m'n., 360 U.S. 378 (1959). Keeping in mind the significance of this proceeding to effective and meaningful rate regulation in the public interest, we must take cognizance of Congress' intent and look to the meaning of "refund" in the broader context of Section 4(e) and, indeed, the entire Act.

The Commission's power to suspend rate increases for limited periods and to order the disposition of refunds

which result from putting the increased rates into effect at the end of the suspension period, but prior to a determination of whether they are just and reasonable, is derived from Section 4(e) of the Act, which provides, *inter alia:*

> Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified.

This language affirmatively sets forth the statutory power of the Commission to act on refunds: "to order such natural-gas company to refund, with interest. . . ."[5] It also defines the subject over which the Commission may exercise its refund power: "the portion of such increased rates

[5] The Court of Appeals, in *Niagara Mohawk Power Co.* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967), noted in referring to section 309 of the Federal Power Act, the counterpart of section 16 of the Natural Gas Act, "We are mindful of the liberal interpretation the Supreme Court has given similar provisions in other statutes as reflecting a broad authority, and in appropriate cases a correlative duty, to effectuate the public interest." Section 16 in pertinent part authorizes this Commission "to perform any and all acts, and to prescribe . . . such orders . . . as it may find necessary or appropriate to carry out the provisions of this act." It is clear that section 16 is perfectly consistent with the Commission's power to order the disposition of refunds under section 4(e).

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or charges by its decision not found justified." *It does not on its face, however, prescribe to whom the ordered refunds must be paid.* On this point the legislative history is illuminating.

The Natural Gas Act followed enactment of the Interstate Commerce Act and the Federal Power Act. Being the first regulatory law of its kind, the Interstate Commerce Act at times served as a prototype for subsequent regulatory legislation. Thus, it is not surprising that in certain respects the Power Act

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and Gas Act followed very closely, indeed sometimes identically, the language of the Commerce Act. Nor is it surprising that in certain other respects the Power Act and Gas Act, because they deal with different industries, departed from the language of the Commerce Act. Where the language of a provision common to the Acts is similar, this similarity is an important aid to statutory construction. Where the language of a provision common to the Acts is not similar, this too is an important aid, for the dissimilarity serves to emphasize a difference in the meaning of the provisions. Such a dissimilarity is an outstanding feature in the legislative history of the refund provision of Section 4(e), which discloses Congress' use of certain refund language in the Commerce Act, the adoption of identical refund language in the Power Act; the inclusion of identical language in the early natural gas bills; but the ultimate elimination of that language from the Gas Act as adopted.

The refund provision of the Commerce Act is a part of Section 15(7). It empowers the ICC to order railroads "to refund, with interest *to the persons in whose behalf such*

amounts were paid, such portion of such increased rates and charges as by its decision shall be found not justified." (Emphasis added.) Similarly, Section 205(e) of the Power Act directs the FPC to

order any refunds "to persons in whose behalf such amounts were paid." The early natural gas bills, H.R. 5423, 74th Cong., 1st Sess. (1935); H.R. 11662, 74th Cong., 2d Sess. (1936); S. 4480, 74th Cong., 2d Sess. (1936), include the identical refund provision. However, the phrase "to the persons in whose behalf such amounts were paid" is absent from the later natural gas bills, H.R. 12680, 74th Cong., 2d Sess. (1936); H.R. 4008, 75th Cong., 1 Sess. (1937); H.R. 6586, 75th Cong., 1st Sess. (1937), and is not a part of the Gas Act.

In view of Congress' consideration of certain language in the early natural gas bills and the elimination of that language thereafter, we find no merit in the argument of Texas Eastern and its supporters that we should read into Section 4(e) the very words which Congress took out. The fact that testimony given at Congressional hearings held on the natural gas bills includes statements that the Gas Act is "substantially similar" to the Power Act is in no way inconsistent with this finding. There is, indeed, a similarity between the general language of those acts. The controlling fact, however, is that there is a dissimilarity between the specific refund language of those acts.[6] Con-

[6] Our concern in this proceeding, of course, is construction of the Natural Gas Act. Construction of the Interstate Commerce Act or the Federal Power Act is not in issue, although it would appear that even under the language of those acts the specific person who pays the overcharge may not necessarily be the identical person who receives the refunds.

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gress has spoken with direction. It is

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our responsibility to respect those words and adhere to the Congressional mandate.[7]

Since the literal wording of the Act does not direct to whom the subject refunds must be paid and since Texas Eastern has no legal right thereto, we think the statutory scheme and purpose of the Act provide the necessary guidance for determination of who should receive the subject refunds. In *Texas Eastern Transmission Co.* v. *FPC, supra,* at 239, the Court stated:

> From well-head to pipeburner any or all of the distributors and users of United's natural gas may have equitable claims to the refunds. *But overriding all claims is the public's interest in Commission procedures and process that will produce reasonable rates. The dimensions of the problem, including particularly the responsibility of the Commission to discharge its statutory duty to protect the public interest,* require that the Commission give full consideration to all of the relevant legal and

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> policy issues. We do not see how the Commission can accomplish that purpose without a searching inquiry into all of the conflicting considerations against a back-

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[7] See, generally, for a discussion of the case-law governing statutory construction vis-a-vis administrative agencies, the article of N. L. Nathanson, Professor of Law, Northwestern University, "Administrative Discretion in the Interpretation of Statutes," 3 *Vanderbilt L. Rev.* 470 (1950).

drop of cold facts, practical consequences, and statutory purposes. [Emphasis added.]

We are mindful that the Act was promulgated to protect ultimate consumers of natural gas from excessive charges. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). It provides a "complete, permanent, and effective bond of protection" for those consumers. *Atlantic Refining Co.* v. *Pub. Serv. Comm'n.*, 360 U.S. 378, 388 (1959). They are the intended beneficiaries of rate regulation, and, when the Act is applied, it is their collective interest that must guide the way. *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949). Thus, on the facts of this record, and on consideration of "the revelant legal and policy issues," *Texas Eastern Transmission Co.*, v. *FPC*, *supra* at 239, we find that under the Act the ultimate consumers of natural gas are proper beneficiaries of our disposition of the subject refunds.[8]

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The structure of the Act and the reach of our jurisdiction over the subject refunds do not extend directly to the ultimate gas consumers. This proceeding indeed would be a desirable case for practical implementation of the poetic pronouncement that "man's reach must exceed his grasp." But, given the limitations of jurisdiction circumscribed by law rather than poetry, we must assume that the affected state commissions will discharge their respective responsi-

[8] *Cf.* Pub. Serv. Comm'n. v. FPC, 329 F. 2d 242 (D.C. Cir. 1964), *cert. denied, sub nom.* Prado Oil & Gas Co. v. FPC, 377 U. S. 963 (1964), where the Court of Appeals stated:

> The basic purpose of the National Gas Act is consumer protection from unreasonable prices, and refund of excessive utility rates is a well recognized remedy. It would need to be quite clear from the act that the Commission lacked the power to use such a remedy for the courts to deny it. We find no such clarity.

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bilities in furtherance of the objectives of their legislative charters, the Natural Gas Act, and the action we take herein. The regulatory commissions of California and New York made clear their intentions to assure that ultimate gas consumers receive the full benefits of our action. We can only encourage all affected state commissions and distribution companies to share, and indeed to effectuate, those intentions.

DISCUSSION

It is axiomatic that this Commission may not order reparations. See, *e.g.*, *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). That power was delegated to the Interstate Commerce Commission, but was withheld under the Natural Gas Act. Texas Eastern and its supporters argue that disposition of the subject refunds to a person other than Texas Eastern

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would constitute an award of reparations. Specifically, Texas Eastern argues, "Reparations would clearly be involved since Texas Eastern would be required to give up what it is entitled to receive and retain in the absence of a retroactive review of the past firm rates charged to its customers."[9] The major defect of this argument, however, is that it assumes the answer to the very question in issue — whether Texas Eastern is indeed "entitled to receive and retain" the subject refunds.

When we focus on the actual mechanics of what is involved, the unsoundness of Texas Eastern's "reparations" argument becomes clear. The rates charged by Texas East-

[9] Brief on exceptions, p. 62.

ern to its customers during the years in question were established in 1961. In this proceeding we are neither recomputing those rates nor requiring Texas Eastern, retroactively or otherwise, to return to its customers any amounts or portion of total sums it previously collected under its established rates. To the extent that this proceeding may be labeled a rate proceeding at all, it is one ancillary to the rate proceedings which fixed the rates of Texas Eastern's suppliers and determined that the rate increases they collected subject to refund were unlawful. Indeed, as the Court of Appeals noted, this

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proceeding was instituted to provide the "backdrop of cold facts, practical consequences, and statutory purposes." *Texas Eastern Transmission Co.* v. *FPC, supra* at 239, necessary to answer the question of how to dispose of the monies which Texas Eastern's suppliers collected, subject to refund, in those other proceedings. Whatever the answer to this question, and whatever may be Texas Eastern's rights to the subject refunds, no retroactive review of the past firm rates charged Texas Eastern's customers is involved.

Texas Eastern and its supporters contend that because Texas Eastern paid increased rates to its suppliers and did not file "tracking" rate increases, Texas Eastern "absorbed" its suppliers' increased rates, and therefore, has legal and equitable rights to the subject refunds. Although other parties object to characterizing Texas Eastern's action as "absorbing" its suppliers' rate increases, it is a matter of record that during the years in question, Texas Eastern did not file increased rates. Similarly, it is a matter of record, and indeed of law, that throughout these

years Texas Eastern had a right to file rate increases under Section 4 to meet its suppliers' rate increases in whole or part. This is the context in which we must evaluate Texas Eastern's contention.

In our opinion, Texas Eastern's failure to exercise its statutory right to track its suppliers' rate increases by filing rate increases of its own does not as a

matter of law support Texas Eastern's claim to the refunds ordered in the suppliers' rate proceedings. Texas Eastern had contractual obligations to purchase gas at the prices authorized in its contracts with its suppliers. The refunds now in issue stem from the fact that increased rates paid by Texas Eastern, pursuant to these contractual obligations, were suspended and subsequently held to be unjust and unreasonable, or were reduced pursuant to a settlement of a supplier's rate proceeding. If Texas Eastern had passed the increased charges on to its customers by filing tracking rate increases, it could, of course, in the proceeding held on its rate increases, claim that its higher rates were justified by the increased rates its suppliers had in turn justified and kept. But, it does not follow that Texas Eastern's failure to file tracking rate increases justifies its retention of that portion of its suppliers' rate increases which were subsequently ordered to be refunded. For that erroneously assumes that Texas Eastern has a statutory right to be reimbursed for every increase in its purchased-gas costs, and can exercise this right either by filing a tracking rate increase or, at its option, by "absorbing" its suppliers' rate increases with the thought that they will be held to be unjustified, and that Texas Eastern automatically will receive the refunds.

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The unsoundness of such an assumption can be simply demonstrated. Assume a supplier of Texas Eastern puts into effect, subject to refund, a rate increase aggregating $1,000,000 over a period of one year. Assume Texas Eastern then files, and puts into effect, a tracking rate increase amounting to $1,000,000. It is clear that in such a situation the fact that the supplier justifies all of its $1,000,000 increase in its rate proceeding would not determine Texas Eastern's entitlement to any of the $1,000,000 involved in Texas Eastern's tracking rate proceeding. Instead, depending upon its overall cost-of-service presentation, Texas Eastern might be shown entitled to only part, or even none, of the $1,000,000 — though it paid that amount to, and gets no refund from, its supplier — and might prospectively end up with rates lower than those which it had at the start of the proceeding.

If, in the above example, we assume that the supplier justifies half of its $1,000,000 increase, but Texas Eastern, as before, justifies no increased rates (even assuming that $1,000,000 increase in its costs), we would face a situation where the supplier would keep $500,000, and Texas Eastern would be required to return the $1,000,000 it collected from its customers on the assumption that the supplier would keep all of the $1,000,000 Texas Eastern paid. This would leave for disposition by the Commission the refunds of $500,000 which the supplier would be required to make. Clearly, Texas Eastern would have no entitlement to

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those refunds, either contractually or as part of the statutory scheme under the Act. For Texas Eastern was con-

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tractually obligated to pay its supplier $1,000,000 and its tracking rate proceeding showed that, despite incurring the costs of the entire $1,000,000 supplier rate increase, it was not entitled to charge higher rates.

In short, the statutory right of a pipeline to file any contractually authorized rate increase, whenever it believes its cost-revenue situation so requires to maintain a reasonable rate of return on its investment, is merely the procedural device established in the Act by which it can seek higher rates when its costs go up, including increased costs which are contingent upon other rate proceedings. This device does not give the pipeline any substantive right to recoup increased costs regardless of its financial position. And, the pipeline cannot, by opting not to file (and thus protecting itself against the possibility of having its rates decreased), secure a substantive entitlement to such portion of its supplier's increase which may be held unjustified.

The more difficult question is whether it is necessary or appropriate to give a pipeline like Texas Eastern, which has paid rate increases but not filed tracking rate increases, a second opportunity to show

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that it is entitled to be reimbursed for its increased purchased-gas costs in the proceedings subsequently held to determine the appropriate distribution of its suppliers' refunds. In a somewhat analogous situation, involving a court's disposition of a fund created by its stay of a Commission rate reduction order, the Supreme Court in *FPC* v. *Interstate Gas Co.*, 336 U.S. 577 (1949), concluded that some situations are "conceivable" in which intermediate pipelines (such as Texas Eastern in this proceeding) would

have a claim to the fund, and the court should thus allow those pipelines to attempt to make the requisite showing. The opinion of the Court, delivered by Justice Douglas, refers to only one specific situation where the intermediate pipelines necessarily "would be entitled to the refunds"— where they had already passed on the stayed rate reduction to their customers and thus had "done all in their power to effectuate the policy of the Act." But, the majority of the court did not foreclose court consideration of claims by an intermediate pipeline to the refunds on grounds the pipeline could show it made less than a reasonable return during the period the fund was created.

We do not believe that *Interstate* compels us, in the rate increase situation we are faced with here, to give every pipeline that may subsequently be in Texas Eastern's position the right, after foregoing a tracking rate increase of its own, subsequently to make the same type of showing — free of the risk of having its rates adjusted downward — in the

proceeding held on the disposition of its suppliers' refunds. Aside from the possible differences between the roles of a court of equity and an administrative agency operating under a discrete statute, there is a significant difference between the rate decrease situation presented in *Interstate* and the rate increase situation involved here, an intermediate pipeline faced with a rate decrease ordered by the Commission obviously is less able to invoke the rate change provisions of the Act to protect itself against being in a deficit provision in the future if the supplier rate decrease ordered by the Commission were to be set aside. However, in any event, assuming the majority viewpoint

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in *Interstate* is governing herein, we will resolve the question not reached by the Court by holding that neither the letter nor spirit of the Act requires a pipeline which has chosen not to file tracking increases, where its suppliers have filed rate increases, to get a risk-free second chance to demonstrate its need for greater revenues in the proceedings to dispose of its suppliers' refunds.

It may be contended that the effect of this conclusion will be a great proliferation of protective rate increases and a concomitant increase in the Commission's workload. Any such result is unlikely. The factors going into a pipeline's decision to file a rate increase are many: the possibility of recovering an

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indeterminate portion of supplier rate increases would not normally appear to be controlling. In any event, the additional complications of such rate increase proceedings as may result should not outweigh the complications which would result from the consideration of pipeline entitlement claims in each case where supplier refund dispositions are in issue.

While we thus do not expect in the future to entertain pipeline entitlement claims, we are cognizant of the contention strongly advanced by Texas Eastern here, that it would be unfair to apply the newly enunciated policy to it. In the absence of any previous Commission holding on this question of pipeline entitlement to supplier refunds, or of any challenge to the then normal practice of intermediate pipelines not under an express flow-through obligation retaining all supplier refunds, Texas Eastern, it is suggested, could not reasonably have been expected to an-

ticipate this decision and protect its rights by filing a tracking rate increase.

We are persuaded that this argument has sufficient merit to justify according Texas Eastern an opportunity to show in the present proceeding what it might have demonstrated in a rate case had it been previously made aware of our ruling here. See *Niagara Mohawk Power Corp.* v. *FPC*, *supra* at 160. This opportunity was expressly accorded Texas Eastern in the present proceeding by our Order of October 4, 1965. But, Texas Eastern has not even excepted to the Examiner's conclusion, fully supported by the record,

that in each of the three years in issue Texas Eastern in fact earned substantially more than a reasonable rate of return on its investment. Under these circumstances there is no merit to the contention that it is inequitable to apply the policy enunciated in this decision to Texas Eastern.

We wish to make clear that the opportunity which we afforded Texas Eastern here to contend it was entitled to a portion of the refunds, because in the period in question it earned less than a reasonable return, will not be afforded to it or any other pipeline with respect to supplier refund obligations accruing subsequent to the date of this opinion. Moreover, it is only available to those pipelines who actually incurred increased costs as a result of effective supplier rate increases but did not file tracking rate increases. Where such tracking increases were filed, the proceedings thereon will determine the pipeline's entitlement to any increased revenues. Where, as is the case with Texas Eastern's pipeline-purchasers, no additional costs related to the supplier increases were incurred, it is clear that no valid

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claim to any part of the refunds can be premised on the revenue position of the pipeline-purchaser during the period of accrual.

While the foregoing discussion has dealt with Texas

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Eastern's principal arguments, there are several ancillary matters which warrant our attention. The first concerns the portion of the refunds from Texas Eastern's suppliers which is not attributable to the gas Texas Eastern sold for resale subject to our jurisdiction. During the years in question, Texas Eastern made a minimal amount of direct sales, virtually all involving field sales to producers and pipelines. For the years 1962, 1963, and 1964, these direct sales were .6%, .8% and .7%, respectively, of Texas Eastern's total gas sales.[10] Perhaps because this small percentage represents a minuscule portion of Texas Eastern's business, there is nothing significant in the record concerning the disposition of refunds pertaining thereto, and nothing is argued thereon in the exceptions to the Examiner's initial decision or in the briefs before us. Nevertheless, since this proceeding is a case of first impression, we believe it appropriate to discuss the matter rather than to rely upon any possible waiver of rights by the parties.

Pipeline direct sales are of two types. Some pipeline direct sales are regulated by state commissions, or other competent state bodies — this is the normal situation with the retail sales of some jurisdictional pipelines (not including Texas Eastern) which also operate in part as local gas distributors. Other direct sales — typically main-line direct sales, or field sales

[10] Texas Eastern Transmission Corporation, Form 2, 1962, 1963, 1964.

of the type made by Texas Eastern — though constitutionally subject to state or local regulation, may not be within the delegated authority or jurisdiction of a state regulatory body, or, as a matter of policy, may be free from actual regulation.

In the first situation — sales which are non-jurisdictional only in the sense that they are regulated by state bodies rather than by this Commission — the responsibility for determining whether refunds should flow-through to the direct sales customers in whole or part, and the manner thereof, lies with the state regulatory bodies. In the second situation — sales which are not only non-jurisdictional but are also non-regulated — the relations between the parties are determined by contract. With respect to such sales, the legislatures, Federal and state, have determined that there is no public need for superimposing a regulatory authority upon the contractual rights of seller and purchaser when the seller's costs increase or decrease. This does not necessarily mean that such purchasers will not be entitled to the refunds attributable to their respective portions of the gas purchased and resold by the pipeline. Where the contract of the pipeline with the direct purchaser provides, as some direct sales contracts do, for automatic price escalations in the case of increased purchased-gas costs (or the

pipeline is entitled by contract to increase its rates and does so), the direct purchaser may well have a claim against the pipeline if all or part of such price increases are subsequently ordered to be refunded. See *Northern Natural Gas Co.* v. *FPC*, 245 F.2d 892, 898 (8th Cir. 1954). If, on the other hand, the direct sales contract provides for a

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fixed price, then the pipeline, in effect having borne the risk of increased costs (and not being able to file tracking increases), may well be entitled to retain the portion of any refunds attributable to the sale. *Northern Natural Gas Co.* v. *FPC*, 254 F.2d 466 (8th Cir. 1958). But, in either case, the rights and obligations of the parties to the direct sales are matters of contract, and subject to resolution in judicial proceedings, rather than by a Federal or state regulatory body.

One consequence of the existence of unregulated direct sales rates may be that pipeline customers of Texas Eastern — which, unlike Texas Eastern, did not incur any increased costs of their own — will be able to retain portions of the refunds flowed-through to them. If the determination of the appropriate ultimate recipient of the refunds depended upon the relative equities of the two pipelines, it might well be argued that Texas Eastern has a greater claim. This, however, is not the situation; if either Texas Eastern or one of its pipeline customers is entitled to retain refunds attributable to unregulated direct sales (and nothing in this opinion should be taken as an indication that this is the fact), this result stems from the

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contractual obligations between the parties to these unregulated direct sales. The uncertain nature of a pipeline-purchaser's obligations to flow-through refunds to a direct industrial purchaser, under a contract not subject to regulation, is no more basis for permitting Texas Eastern to retain that portion of the refunds than the possibility that local distributor-purchasers, subject to state regulatory authority, might be permitted to retain some or all of the refunds. Unlike the courts operating pursuant to their equitable powers in cases like *Interstate, supra*, we have

no authority to enforce potential consumer rights in either the direct sales or local distribution situation.

In addition to sales for resale subject to this Commission's jurisdiction, and direct sales subject to the jurisdiction of state regulatory bodies or entitrely unregulated, there is another way in which Texas Eastern disposes of gas it purchases from its suppliers. This is in the operation of the pipeline itself, as fuel or as line losses. During the years in question, the quantity of gas both utilized and lost and unaccounted for by Texas Eastern amounted to about 2.3% of its total gas receipts in 1962, 2.5% in 1963, and 1.7% in 1964.[11] The cost of this gas, however, is just as

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much a part of Texas Eastern's cost of service and the price charged by Texas Eastern to its customers as the cost of the gas which is physically delivered to its customers, and any refunds attributable thereto should flow-through to Texas Eastern's customers just the same as other refunds. Where, as here, there are two types of sale — jurisdictional and non-jurisdictional— the refund attributable to gas utilized or lost and unaccounted for in pipeline operations should be allocated between the two classes, but this is a relatively easy procedure.[12]

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[11] Texas Eastern Transmission Corporation, Form 2, 1962, 1963, 1964.

[12] Texas Eastern's Form 2 for the three years in question also lists the company's own production, as well as various amounts transported for others and exchanged with other pipelines. There are also entries for gas taken from and delivered to storage. The company's own production does not enter into the picture here since none of the refunds reflects such acquisitions. The other accounts roughly are in balance over a period of time and presumably would be so treated in any final allocation. Any questions as to their appropriate treatment can, of course, be handled in the further proceedings we are ordering.

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It is clear at this juncture of the proceeding that we cannot and should not definitively enunciate Texas Eastern's rights with respect to the refunds relating to Texas Eastern's few non-jurisdictional sales. We do not know to what extent the states in which these sales take place assert jurisdiction over them, nor do we know the specific terms of the individual direct sales contracts. Thus, we shall direct the Examiner in the further proceedings we are ordering to make the appropriate allocation between refunds

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attributable to Texas Eastern's jurisdictional and non-jurisdictional sales.

It appears to us from Exhibit No. 2 and data available in the dockets of Texas Eastern's suppliers that of the total sums for the years in question which those suppliers are required to refund to Texas Eastern, approximately 60 percent relate to the demand component of those suppliers[13] and 40 percent relate to the commodity component.[14] Texas Eastern, for the purpose of further flowing-through these refunds, will thus receive from its suppliers approximately 60 percent of the refunds through its demand component and approximately 40 percent through its commodity component. Accordingly, the allocation of the refunds between Texas Eastern's jurisdictional and non-jurisdictional customers, and the refunds among Texas Eastern's jurisdictional customers shall reflect the "as received" basis (approximately 60 percent demand and 40 percent commod-

[13] Refunds relating to the demand component result from purchases of Texas Eastern from United Gas Pipeline Company.

[14] We expect that accurate demand and commodity allocation percentages will be established in the further proceedings we are ordering.

ity).[15] Similar flow-through, on an "as received" basis (based upon the appropriate percentages for demand and commodity), shall be made by each of the natural gas pipeline

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companies subject to our rate jurisdiction which receive refunds as a result of our action herein.

If any of Texas Eastern's pipeline-purchasers subject to our rate jurisdiction seek an opportunity to show, in light of the principles set forth in this opinion, that they are entitled to receive and retain a portion of the subject refunds, further proceedings, after duly published notice, will be required with respect to that portion.

PAST COMMISSION PRACTICE

Texas Eastern and its supporters argue that the Commission's past practice in ordering the disposition of refunds requires that we find Texas Eastern entitled to the subject refunds. This argument is unsound for two reasons: first, it presupposes that the Commission consciously and squarely faced the instant refund issue at an earlier date and that a firm policy was adopted; second, assuming *arguendo*, that such policy was adopted, it seeks to impose upon us the duty to perpetuate that policy notwithstanding its incompatibility with the legislative objectives. As all parties have recognized in their briefs, this proceeding involves an issue

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of first impression as a contested matter before the Commission; it is a "novel" issue without administrative prece-

[15] *Cf.* United Fuel Gas Co., 32 FPC 1106 (1964).

dent.[16] The fact that the issue was not resolved by the Commission at some earlier date is not controlling.[17] What is controlling is that failure to resolve it correctly now would contravene the public interest.

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THE 1961 SETTLEMENT AGREEMENT

The Examiner found,

> It is clear that the . . . [1961] settlement agreement refers to refunds relating to supplier rates then in effect, including the issue of refunds which might be

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[16] "The novel orders of the Federal Power Commission attacked in these proceedings mark the Commission's decision to take a new and close look at its jurisdiction over refunds generated under Section 4(e) of the Natural Gas Act." Texas Eastern Transmission Co. v. FPC, *supra*.

[17] *Cf.* U. S. v. Morton Salt Co., 338 U.S. 632, 647-48 (1949), where the Supreme Court stated:

> Respondents also say that the present use of the asserted power is novel and unprecedented in Commission practice and introduces a new method of investigating compliance. Respondents are not without statements by the Commission or its officials, dicta from judicial opinions, views of text writers and facts of legislative history which would give some support to this theory. But this Court never before has been called upon to deal consciously and squarely with the subject.
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> The fact that powers long have been unexercised well may call for close scrutiny as to whether they exist; but if granted, they are not lost by being allowed to lie dormant, any more than nonexistent powers can be prescripted by an unchallenged exercise. We know that unquestioned powers are sometimes unexercised from lack of funds, motives or expediency, or the competition of more immediately important concerns. We find no basis for holding that any power ever granted to the Trade Commission has been forfeited by nonuser.

Cf. also Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954).

generated by the then effective rates, and does not govern the refunds here at issue.[18]

Texas Eastern and its supporters except to this finding. Texas Eastern argues that "the Commission is faced with a controversy over the interpretation and meaning of a settlement contract,"[19] under which, if properly interpreted, Texas Eastern "has the right to receive and retain the refunds involved in this case."[20] In support of its position, Texas Eastern relies upon various provisions, read both jointly and severally, of the settlement agreement, and also upon testimony relating to what it claims was the necessary intent of the parties to the agreement; but an "intent" which was not made known to the Commission at the time the settlement agreement was placed before the Commission for approval or re-

jection. California, New York, Brooklyn Union, UGI, and the Commission Staff, however, contend, and we agree, that the Examiner's finding is correct.

Within the four corners of the settlement agreement, it is clear that there is no provision which precludes the action we are taking over the subject refunds, or which in any way purports to discuss how these refunds, in dockets which were not even in existence at the time the parties

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[18] Initial decision, p. 13.

[19] Brief on Exceptions, p. 67.

[20] Brief on Exceptions, p. 66.

(765)

agreed to the settlement,[21] should be treated. If we were to accept Texas Eastern's argument and conclude, nevertheless, that the 1961 settlement agreement covers the subject refunds, we would first have to read into that agreement a provision which in fact is not there. As the Court of Appeals stated with

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reference to a settlement agreement in *Texas Eastern Transmission Co.* v. *FPC*, 306 F.2d 345 (5th Cir. 1962), however, this Commission may not "read into contracts things which are simply not expressed or not there. . . .[22] The weight of our opiniion herein indicates that we are not relying upon the 1961 settlement agreement as an affirmative predicate for our authority over the disposition of the subject refunds; we are simply relying upon the record herein which discloses that the 1961 settlement agreement is not a bar to our action under the Act.

OTHER COMMISSION ORDERS

Texas Eastern argues that as a jurisdictional customer of United Gas Pipeline Company, Texas Gas Transmission

[21] Texas Eastern points out that some of its supplier rate increases, namely the rate increases of United filed on January 18, 1961, and Texas Gas filed on October 21, 1960, which led to a portion of the subject refunds were filed prior to the date the Commission approved the 1961 settlement agreement. Texas Eastern's 1961 settlement was based upon a cost of service which included all of the contingent rate increases being collected by Texas Eastern's suppliers as of October 27, 1959, and expressly provided for flow-through of refunds of suspended rate increases included in Appendix C to the settlement agreement. The rate increases of United and Texas Gas filed after October 27, 1959, but before January 25, 1961, the date the Commission approved the 1961 settlement agreement, were not included in Appendix C and were thus not a part of the settlement agreement.

[22] Cf. Manufacturers Light & Heat Co. v. FPC, 374 F.2d 88 (3rd Cir. 1967).

Corporation, and Southern Natural Gas Company, it is entitled to certain refunds under United Gas Pipeline Company's 1962 settlement, [23] Texas Gas Transmission Corporation's 1961 settlement,[24] and the 1963 Order terminating Southern Natural Gas Company's rate proceeding.[25] The

orders issued in those proceedings directed the respective pipeline suppliers to pay to their jurisdictional customers monies predicated upon a post-audit cost of service for United and Texas Gas, and upon a flow-through of future supplier refunds for United, Texas Gas, and Southern Natural.

The United, Texas Gas, and Southern Natural proceedings, specified above, were concerned solely with the lawfulness of the supplier rates there in issue. Supplier rates were established and refunds were ordered. As Brooklyn Union and the Commission Staff have pointed out, no designation of the ultimate persons entitled to retain these refunds was effected; such was not the issue. It is the issue in this proceeding, however, and we have herein determined that Texas Eastern has not established entitlement to all of these refunds.

The Commission finds:

(1) Texas Eastern has not established its entitlement to receive and retain all of the subject refunds.

(2) This proceeding should be remanded to the Examiner in order that he may make the appropriate allocation between refunds attributable to Texas Eastern's juris-

[23] 27 FPC 504 (1962).
[24] 26 FPC 924 (1961).
[25] 29 FPC 323 (1963).

dictional and non-jurisdictional sales, and order disposition of the subject refunds consistent with the views expressed herein.

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The Commission orders:

This proceeding is remanded to the Examiner in order that he may make the appropriate allocation between refunds attributable to Texas Eastern's jurisdictional and non-jurisdictional sales, and order disposition of the subject refunds consistent with the views expressed herein.

By the Commission.
(SEAL)

Gordon M. Grant,
Secretary,

* * * * * * * * *

From Texas Eastern Transmission Corporation's Motion for Rehearing of Opinion No. 540, Filed with the Federal Power Commission on June 3, 1968.

* * * * * * * * *

22.

The Commission erred in holding that Texas Eastern is not entitled to receive and retain refunds attributable to purchases of gas during 1961.

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Argument

The Commission holds that Texas Eastern is not entitled to the subject refunds because it "in each of the three years

in question" it "earned substantially more than a reasonable rate of return on its investment". (p. 12). The Commission's reference to the rate of return earned by Texas Eastern "in each of the three years in issue" is obviously directed to the years 1962, 1963 and 1964. (pp. 12 and 13). In thus confining its discussion of the rate of return earned by Texas Eastern to these three years, the Commission has completely overlooked the fact that on page 2 of its opinion the Commission recognizes that the refunds at issue "relate to Texas Eastern's suppliers' rate increases during the years 1961-64 inclusive." There is no evidence whatever to support a finding that Texas Eastern earned in excess of a reasonable rate of return during the year 1961. Quite the contrary, the uncontradicted evidence establishes that the rates fixed in Texas Eastern's 1961 Settlement were designed to produce revenues commencing December 1, 1959 in an amount of $2,000,000 per annum less than the agreed upon settlement cost of service. In addition, in the year 1961, Texas Eastern refunded to its customers $2,000,000 more than the refunds to which they were entitled under the agreed upon settlement cost of service in Docket No. G-12706. Thus, in the year 1961, Texas Eastern's customers realized $4,000,000 more than they bargained for. Having expressly found that refunds for the year 1961 are at issue in this proceeding, the Commission obviously erred in ignoring that year and the evidence relating thereto in its findings as to refund entitlement.

* * *

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Refunds — Flow-Through

Before Commissioners:

Lee C. White, Chairman; L. J. O'Connor, Jr., Charles R. Ross, Carl E. Bagge, and John A. Carver, Jr.

Texas Eastern Transmission Corporation
Docket No. RP66-12

OPINION NO. 540-A
OPINION AND ORDER DENYING REHEARING

(Issued July 10, 1968)

On May 3, 1968, the Commission issued Opinion 540 adopted with certain modifications the Presiding Ex-

aminers decision in this proceeding. We agreed with his conclusion that Texas Eastern has not established entitlement to all of the refunds at issue herein. Texas Eastern and the Independent Natural Gas Association of America have filed applications for rehearing.

Both applications for rehearing reiterate arguments considered and rejected by the Commission in Opinion 540. We find nothing in the applications for rehearing which would cause us to alter our determinations. However, some additional comment is appropriate.

Texas Eastern alleges that our order in Opinion 540 constitutes unlawful discrimination, arguing that we re-

cently allowed Southern Natural Gas Company and Tennessee Gas Transmission Company to retain certain refunds. *United Gas Pipe Line Company,* 37 FPC 7. The Company cites this as a continuation of what it alleges has been the "normal practice" of the Commission to require payment of supplier refunds to the immediate pipeline purchaser. The arguments concerning past Commission practice generally have been discussed in Opinion 540. Insofar as our recent United Gas order is concerned, the refunds released to Southern Natural were governed by prior settlement orders that explicitly allowed Southern to retain (in part) refunds it received under specific United Gas dockets. *Southern Natural Gas Company,* 29 FPC 323, 356 (ordering paragraph (E)) and 29 FPC 779,

783-4 (finding paragraph (2)). Those refunds differ from the sums at issue here because none of the dockets giving rise to the present refunds was covered by Texas Eastern's 1961 Settlement.

Our United Gas order also distinguishes the Tennessee situation from this proceeding, which was pending before the Examiner. There we emphasized that the $142,604 released to Tennessee was "attributable to a transportation contract, not a purchase of gas . . ." The order indicates that the refund money would not have been released to Tennessee, if the refunds had related to a purchase of gas. Whether or not transportation contracts deserve different treatment, the essential point here is that the distinction, explicitly stated in the United order, would have been unavailable to Texas Eastern in any event, because all of the sums at issue here relate to purchase gas contracts, not to transportation.

(772)

Moreover, even if the amounts released to Tennessee were of the same character as the refunds here, it is obvious that their release was not intended to constitute a substantive determination of the Commission's refund policies. Considering the large amounts being retained pursuant to Commission orders and the pendency of this case, we would not have enunciated refund entitlement principles in an uncontested

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order, based on short refund report letters by the interested parties. Furthermore, our intention not to prejudge the issue presented in this case is manifest in our January 4, 1967 order in *United Gas* which required retention of amounts attributable to pipeline purchasers whose refund obligations were in question. See 37 FPC 9. These included Michigan-Wisconsin Pipe Line Company, The Ohio Fuel Gas Company, and Texas Eastern.

Texas Eastern also contends that we erred in holding that it is not entitled to receive and retain refunds attributable to purchases of gas during the year 1961, because there was no showing that it earned more than a reasonable rate of return in that year. The order instituting this proceeding indicated that neither Texas Eastern's failure to file tracking increases nor the absence of any provisions relating to the subject refunds in Texas Eastern's agreements automatically entitled the company to these amounts. *Texas Eastern Transmission Corporation*, 34 FPC 1099 (1965). The order afforded Texas Eastern and all interveners the opportunity to file direct testimony "with respect to all matters of fact or policy which they believe material to a determination of the issues herein." 34 FPC at 1102. However, though Texas Eastern successfully per-

suaded the Examiner that refunds relating to that year were also in issue, it chose not to avail itself of the opportunity to introduce evidence that purported to show that Texas Eastern

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earned less than a reasonable rate of return in 1961. Thus, the Presiding Examiner correctly concluded that the company had not proven entitlement for those amounts. Nor has it in its present application for rehearing asserted that it in fact failed to earn a reasonable rate of return in 1961, to say nothing of offering any factual support which would justify a further hearing on this point.

Texas Eastern also contends that it had inadequate opportunity to show that it had earned less than a reasonable rate of return for all the years involved. The alleged lack of opportunity stems from the order instituting this proceeding requiring the company to file earnings studies without certain normalizing adjustments. While we did in fact require such studies, our order did not preclude Texas Eastern from filing any other factual studies. Indeed, ordering paragraph (C) proffered a broad invitation to Texas Eastern to file any factual evidence the claimant considered relevant. Thus, Texas Eastern had ample opportunity to show what it might have demonstrated in a rate case had it been previously made aware of our ruling herein.

Texas Eastern contends that our order to flow through certain refunds, which have been paid to Texas Eastern pursuant to order in *Hunt Oil Company*, 30 FPC

220 (1963), constitutes a collateral attack on the *Hunt* order. The order issued therein specifically required Texas Eastern to hold the amounts in a special fund pending Commission action respecting disposition of the refunds. 30 FPC at 223. Therefore, as to those funds the company has always been a stakeholder.

In their application for rehearing INGAA and Texas Eastern argue that the decision we reached herein is inconsistent with the Supreme Court's recent decision in *F.P.C.* v. *Sunray DX Oil Co.*, ... U.S. ....., S. Ct. Nos. 60, *et al.*, O.T. 1967, decided May 6, 1968. They argue that the approved 1961 Texas Eastern settlement created firm rates which, like the final unconditioned initial prices referred to in *Sunray* (slip opinion at page 10), constitute "a lower limit below which a refund cannot be ordered." We are not ordering Texas Eastern to make the refunds proscribed in *Sunray;* we are not ordering Texas Eastern to reduce or refund any part of its firm rates established by the 1961 settlement. Our decision requires flow of refunds from Texas Eastern's suppliers to its resale customers.

The balance of the applications for rehearing filed by Texas Eastern and by INGAA repeat the arguments presented to the Commission on exceptions. We find nothing in

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those arguments that would warrant our granting rehearing.

The Commission finds:

The assignments of error and applications for rehearing filed in this proceeding present no new facts or legal prin-

ciples which would warrant any change in, or modification of, the Commission's Opinion 540 in this proceeding issued May 3, 1968.

The Commissiion orders:

(A) Opinion No. 540 and its accompanying order issued May 3, 1968, are in all respects confirmed.

(B) The applications for rehearing filed in this proceeding and the request for relief contained therein are hereby denied.

By the Commission.
(SEAL)

Kenneth F. Plumb,
Acting Secretary.

APR 29 1970

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1375

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for The People of the State of California and the Public Utilities Commission of the State of California in Opposition

MARY MORAN PAJALICH
J. CALVIN SIMPSON
LAWRENCE Q. GARCIA
RUFUS G. THAYER JR.

5072 State Building
San Francisco, California 94102

Attorneys for the People of the State of California and the Public Utilities Commission of the State of California

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SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1375

TEXAS EASTERN TRANSMISSION CORPORATION,
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vs.

FEDERAL POWER COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Brief for The People of the State of California and the Public Utilities Commission of the State of California in Opposition

---

Pursuant to Rule 24 of the Revised Rules of the Supreme Court, the People of the State of California and the Public Utilities Commission of the State of California (California), respondents in opposition, hereby submit their brief

in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit filed by Petitioner Texas Eastern Transmission Corporation (Texas Eastern) on March 30, 1970. California was a party to the proceeding in the court below whose judgment is sought to be reviewed and is therefore a party respondent in this Court under Rule 21(6) of the Revised Rules of the Supreme Court.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Does Section 4(e) of the Natural Gas Act govern the disposition of refunds resulting from the disallowance of supplier rate increases paid by a pipeline company but not made the subject of a tracking rate increase by such pipeline company?

2. May the Federal Power Commission (Commission) order flow through of supplier refunds, applicable to a past period, where the pipeline company has failed to show that its earnings in such past periods resulted in less than a reasonable return?

3. Assuming that Section 4(e) of the Act does not specifically govern the disposition of supplier refunds, is an order of the Commission requiring flow through of such refunds to customers of the pipeline inconsistent with equitable principles as enunciated by this Court in *Federal Power Commission v. Interstate Natural Gas Company*, 336 U.S. 577 (1949)?

4. May the Commission order flow through of supplier refunds applicable to past periods where, prior to such order, refunds were not required to be flowed through if the

pipeline company had not applied for tracking rate increases?

5. Do the settlement agreements involved in this case govern the disposition of the supplier refunds not expressly disposed of in those agreements?

6. Where the Commission lacks jurisdiction to order the flow through of supplier refunds directly into the hands of ultimate consumers, does this jurisdictional limitation require a conclusion that a pipeline company must be permitted to receive and retain such refunds?

STATUTE INVOLVED

The pertinent provision of the Natural Gas Act, 15 U.S.C. 717c(e), is set forth in the petition at pp. 25-26.

STATEMENT

A. Regulatory Development Leading to the Instant Case.

In the matter of *Hunt Oil Company,* 30 FPC 220, 222 (1963), the Commission recognized that some interstate pipeline companies might take the position that they were not under any obligation to flow through to their customers certain refunds from gas suppliers, and indicated that it was disturbed by the possibility of a gap in the refund line. Subsequently, in *Humble Oil & Refining Company,* 32 FPC 49, 52 (1964), the Commission ordered producers of natural gas to retain amounts refundable by them pending further Commission order. The Commission declared:

> "But in view of our duty to insure that the ultimate consumers of gas actually receive all of the benefits of our rate regulation to which they may be entitled, we shall take action here to assure that, within the limits of our jurisdictional reach, the refunds to be ordered actually flow to those parties legally and equitably entitled thereto."

B. The Commission's Order Instituting the Proceeding and the Petitioner's Attempt to Obtain Judicial Review of That Order.

By its Order Setting Hearing on Refunds issued October 4, 1965 in Docket No. RP66-12 (R. 666-674A), the Commission instituted the proceeding that gave rise to the orders which this Court is now being asked to review (R. 734-776). The question before the Commission was whether Texas Eastern was entitled to receive and retain money collected from it by its jurisdictional gas suppliers which the suppliers had been directed to refund with interest. In the order of October 4, 1965, the Commission noted that staff studies indicated that Texas Eastern had earned, without regard to the claimed refunds, a jurisdictional return of 6.85 percent in 1962, 7.25 percent in 1963, and 7.81 percent in 1964 (R. 670, 674A). The order further observed that 6.5 percent was the highest overall rate of return ever allowed a major pipeline company by the Commission.

The Commission order also stated:

> "... Section 4 of the Act does not in terms provide to whom any refunds we might decide to order should be paid, and that a failure to track a supplier's increase does not necessarily mean that a pipeline has absorbed any cost increase over that upon which its rates were based *since it may well be that such increase has been offset by other purchased gas* or *other cost decreases,* or by *increased sales having the effect of reducing the unit costs.*" (R. 670-671; emphasis added.)

It was further noted that just because Texas Eastern had not bound itself to flow through any refunds resulting from these particular increases does not in itself grant Texas Eastern any rights to secure and retain such refunds (R. 671).

In response to Ordering Paragraph (B) of the Commission's October 4, 1965 Order (R. 672), Petitioner filed a special report showing a rate of return of 6.38 percent for 1962, 6.46 percent for 1963, and 6.43 percent for 1964, utilizing a 6.5 percent rate of return. Petitioner filed the report under protest disclaiming the Commission's jurisdiction to require such a report (R. 675-679).

Texas Eastern attempted to obtain judicial review of the Order of October 4, 1965 and of certain refund retention orders. Its petitions were denied as premature by the Court of Appeals for the Fifth Circuit. *Texas Eastern Transmission Corp. v. Federal Power Commission,* 357 F.2d 232 (5th Cir. 1966). Upon remand to the Commission the subsequent proceedings culminated in Opinion No. 540 (R. 734-768) which found that Petitioner had not established its entitlement to receive and retain all of the subject refunds. Opinion No. 540-A (R. 770-776) denied applications for rehearing of Opinion No. 540.

C. Proceedings on Remand and the Commission's Decision.

The Commission staff put in evidence (R. 583-606) studies indicating that for the years 1962, 1963 and 1964, Petitioner had realized rates of return of 6.59, 6.81 and 6.91 percent, respectively, not including the refunds claimed by Petitioner (R. 586). A staff expert had testified that a reasonable rate of return for the years 1962, 1963 and 1964 was 6.25 percent (R. 559).

Because this was a case of first impression, Petitioner was given the opportunity to show in the proceedings its version of its rate of return for the years in question. However, Texas Eastern countered that its rate of return was irrelevant and offered no contrary evidence, did not challenge the accuracy of the staff's calculations (R. 414, 688),

and asserted that it was entitled to all refunds which it was not expressly bound to flow through as listed in Appendix C of the 1961 settlement agreement (R. 320-323; 415, 416).

Petitioner also contended that where a supplier of natural gas files a rate increase, Section 4(e) of the Natural Gas Act permits such rate increase to be put into effect and collected subject to refund from the pipeline-purchaser. Petitioner argued that for more than 25 years after the Act was passed in 1938, the Commission uniformly ordered all such refunds paid to the pipeline which had "absorbed" the increased supplier rates but had not filed tracking rate increases. Petitioner argued that the subject refunds were created before the Commission changed this policy. Therefore, it would be unfair to Petitioner for these refunds to be flowed through under the Commission's newly announced policy.[1]

In Opinion No. 540, the Commission rejected Petitioner's contentions. The Commission's Opinion cited substantial authority that the Natural Gas Act was enacted to protect the ultimate consumer of natural gas from excessive charges and that it provides a "complete, permanent and effective bond of protection", for ultimate consumers who are the intended beneficiaries of rate regulation.[2] It is their collective interest which must guide the way when the Act is applied and in this case it is the ultimate consumers of natural gas who are the proper beneficiaries of the disposition of the subject refund (Op. No. 540, R. 746).

It was held that Petitioner's failure to exercise its statutory right to track its suppliers' rate increases by filing rate increases of its own does not as a matter of law support

1. (R. 413-420; Petition, p. 3).

2. *Atlantic Refining Company v. Public Service Commission of New York*, 360 U.S. 378, 388 (1959).

Petitioner's claim to refunds ordered in the supplier rate proceedings (Op. No. 540; R. 748, 749).

The Commission concluded that the accounting provision in Section 4(e) does not expressly state to whom such refunds should go.

Since Petitioner had not refuted evidence that it would have earned amounts greater than a reasonable rate of return if it had been allowed to keep the refunds, it was held that the refunds should flow through to the ultimate consumer. The Commission also stated that although the subject refunds were created before the Commission's new policy was announced, Petitioner's risk-free opportunity granted by the Commission to show what might have happened had Petitioner known of the new policy was fair and therefore Petitioner had a reasonable opportunity to prove its claim to the refunds.

A petition for rehearing was denied (Op. No. 540-A; R. 770-776).

D. The Decision of The Court of Appeals.

Petitioner next appealed to the United States Court of Appeals for the Fifth Circuit which affirmed in whole the Commission's decision. *Texas Eastern Transmission Corp. v. Federal Power Commission,* 414 F.2d 344 (1969). The court held that the Commission had the necessary statutory power for the action it took in Opinion No. 540, the overriding purpose of the Act being to protect consumers in their purchase of gas to the end of keeping rates as low as possible (414 F.2d at 347). It was held that the accounting provision of Section 4(e) of the Act does not require payment of refunds only to those persons in whose behalf such amounts were paid, but instead, the refunds are payable to the ultimate consumer whose interests it is the

purpose of the Act to protect. To return them to Texas Eastern,

> "... by virtue of their having paid and absorbed them would be to countenance ratemaking by producer-suppliers and Texas Eastern outside the protective ambit of § 4(e). This approach would do violence to the statutory scheme by avoiding, to the extent that the refunds exceed a fair return to Texas Eastern, any rate regulation whatever except under § 5 of the Act. 15 U.S.C.A., § 717d." (414 F.2d at 348.)

The court concluded that the Commission was not barred by its past actions from adopting a new refund policy. This was simply another step in the gradual development of the Act. Moreover, the 1961 settlement order did not bar the refunds since it did not involve the refunds at issue (414 F.2d at 349).

The court found that the order was rationally based in that it protected the consumer to the extent of the Commission's power by placing the refunds within the jurisdiction of the state regulatory authorities so as to put them in a position to benefit the ultimate consumer. Without this policy there would be no way to benefit the ultimate consumer. Accordingly, Texas Eastern had lost on the merits (414 F.2d at 350).

Upon denial of a petition for rehearing in the Court of Appeals (R. 793), Petitioner seeks a writ of certiorari in this Court.

CALIFORNIA'S POSITION

In settling certain proceedings before the Commission involving El Paso Natural Gas Company (El Paso) and Transwestern Pipeline Company (Transwestern), California sought and obtained the stipulations and agreements of El Paso and Transwestern, which were approved by

orders of the Commission, that the disposition of certain supplier refunds shall be governed by the applicability of such principles as may be finally established in the proceedings before the Commission in *Texas Eastern Transmission Corporation,* Docket No. RP66-12. This is the proceeding as to which Petitioner now seeks review in this Court. California was a party in that proceeding and in the court below and opposes Petitioner in the present proceeding.

It would be ironic indeed if these refunds should be diverted to pipeline companies, the one group which, as a whole, has taken a spectator approach to the problem of just and reasonable producer rates. California believes that if, by not filing tracking rate increases following supplier rate increases, interstate pipelines are permitted to retain refunds from suppliers ordered by the Commission, the ultimate consumer of natural gas, the intended beneficiary of federal regulation of this industry, is deprived of the fruits of regulation. The potential gap in the refund line involved in this proceeding affords an opportunity to all pipelines to frustrate the purpose of the Natural Gas Act.

ARGUMENT

1. The Commission Has Power to Order Flow Through of Supplier Refunds Where the Pipeline Shows No Resulting Loss.

Petitioner bases its claim to refunds on the theory that because it paid and "absorbed" higher supplier rates subsequently disallowed, it is therefore entitled to the refunds. This totally ignores a basic principle of utility regulation, that in return for a protected operating right a utility is allowed a fair rate of return as determined by the regulatory body, thus freeing the utility from the risks experienced in a competitive environment. The purpose of this

type of regulation is to bring the utility's service to the public at the lowest price reasonably possible.

Because the instant case was one of first impression before the Commission, Petitioner was given a risk-free opportunity to show what its earnings might have been had it filed for a tracking rate increase (R. 755). Petitioner chose not to do this; neither did it challenge the figures submitted by the Commission staff showing that, had Petitioner filed for an increase, it might well have been ordered to reduce its rates (Pres. Exam. Op., R. 688). By not filing for a rate increase it appears Petitioner placed itself in a position to enjoy an even more excessive rate of return than that which the evidence indicated it was already enjoying.

The purpose of the Natural Gas Act is to protect ultimate consumers of natural gas from excessive charges.[3] The ultimate consumers are the intended beneficiaries of rate orders by the Federal Power Commission, though state machinery might have to be invoked to attain complete enforcement at the consumer level. Rates set by the Commission or by the companies themselves are presumed to be reasonable and not so low as to entitle the pipeline company to supplier refunds as a matter of law. When looking to the rightful claimants of a gas supplier refund, the responsibility cannot be discharged by payment of the fund to those who show no loss by withholding of the fund. *FPC v. Interstate Natural Gas Co.*, 336 U.S. 577, 581, 582 (1949).

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3. *FPC v. Interstate Natural Gas Co.*, 336 U.S. 577 at 581 (1949); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 at 610, 612 (1944); see also the cases cited in the decision sought to be reviewed, *Texas Eastern Transmission Corp. v. FPC*, 414 F.2d 344, 347 (1969).

Here, if Petitioner had filed a tracking rate increase to pass the supplier rate increase on to its customers, the evidence indicates that Petitioner might not have been granted the tracking increase and therefore would not have been entitled to retain the refund. Thus, Petitioner made no showing of a loss as required by *Interstate.*

To let Petitioner, by virtue of remaining silent, keep refunds which may be in excess of a reasonable return as determined by the Commission under the Natural Gas Act appears to frustrate the purpose of the Act. As the court below stated:

> "... To adopt Texas Eastern's position that it is, *ipso facto,* entitled to the refunds by virtue of having paid and absorbed them would be to countenance rate making by the producer-suppliers and Texas Eastern outside the protective ambit of § 4(e). This approach would do violence to the statutory scheme by avoiding, to the extent that the refunds exceed a fair return to Texas Eastern, any rate regulation whatever except under § 5 of the Act. 15 U.S.C.A. § 717d." (414 F.2d at 348)

Accordingly, it is clear that the Commission has the power to order such refunds to the pipeline's customers or other claimants where the pipeline has not demonstrated entitlement to the funds or a reduction of earnings below a reasonable return. If this were not so, it would seem the Natural Gas Act would be applied in favor of the pipeline companies rather than the consumer.

But of even greater importance than the risk-free chance given Petitioner to demonstrate loss is Petitioner's decision —prudently made, one must assume—not to file tracking rate increases. This decision by itself should be sufficient to support a finding that Petitioner would incur no injury if

it is not permitted to retain future supplier refunds. As the Commission held:

> ". . . However, in any event, assuming the majority viewpoint in *Interstate* is governing herein, we will resolve the question not reached by the Court by holding that neither the letter nor spirit of the Act requires a pipeline which has chosen not to file tracking increases, where its suppliers have filed rate increases, to get a risk-free second chance to demonstrate its need for greater revenues in the proceedings to dispose of its suppliers' refunds." (Op. No. 540, R. 753.)

California submits that the Commission's orders herein are not only consistent with the purpose of the Natural Gas Act but are also in accord with principles of equity.

2. Section 4(e) of the Natural Gas Act Does Not Require Payments of Refunds to Any Particular Party.

Petitioner relies on *FPC v. Sunray DX Oil Co.*, 391 U.S. 9 (1968), for an explanation of the accounting provision in Section 4(e) of the Natural Gas Act, in support of its claim to the refunds. While the section requires suppliers to keep detailed accounts of amounts received by reason of rate increases, specifying by whom and in whose behalf such amounts were paid, the section clearly does not say to whom such amounts should be paid upon distribution of refunds created by disallowance of supplier rate increases.

Sunray surely does not hold that the accounting provisions of Section 4(e) require the payment of supplier refunds to the party who had paid the supplier rate increase. In *Sunray* this Court looked to the accounting provisions of Section 4(e) as a basis for its holding that only the rate increase is subject to refund in whole or in part under that section.

As pointed out by the court below, express wording directing disposition of such refunds was omitted from the Natural Gas Act (414 F.2d at 348). The court stated:

> "Our view is that the Commission was authorized to see to disposition of the refunds in question on the basis of the purpose of the Act, to protect ultimate consumers of natural gas."

The conclusion of the court below that Section 4(e) does not prevent the Commission from ordering a flow through of refunds is sound and should not be disturbed.

3. The Commission's Decision Does Not Order Reparations.

Petitioner's claim that the order violates the prohibition against reparations, reaffirmed in *Sunray,* 391 U.S. 9, 24 (1968), seems to miss the issue. It is not Petitioner's rates that are at issue. These rates remain intact. As announced in *Interstate:*

> ". . . it is not ratemaking to determine the equity of the claim of the pipeline companies to the fund. . . . The reasonableness of rates charged by the companies who claim the fund is wholly ancillary to the problem of determining what claimants are equitably entitled to a share in it." (336 U.S. 582, 583.)

Here the issue is to dispose of supplier refunds and not to require Petitioner to adjust its past rates in any manner.

4. The Commission's Decision Does Not Conflict With Interstate or Other Cases Bearing on the Issues.

Petitioner claims that the decision sought to be reviewed is in conflict with *Interstate, supra,* and its progeny, relying on *Northern Natural Gas Co. v. FPC,* 215 F.2d 892 (8th Cir. 1954) and *United Fuel Gas Co. v. FPC,* 367 F.2d 34 (4th Cir. 1966).

We have already pointed out that the Commission's order is not in conflict with the equitable principles which governed this Court's decision in *Interstate*. The Commission's order was made in furtherance of the purpose of the Natural Gas Act and fairly directs refunds toward ultimate consumers. Texas Eastern does not, because it cannot, claim that its rates were so low that it is entitled in equity to the supplier refunds.

The *Northern Natural* case appears to provide some support for Petitioner's argument that a party who has "absorbed" a refund, by not passing on the rate increase from which the refund arises to its customers, is entitled to receive and retain the refund. In *Northern Natural*, the court addressed itself to the distribution of a fund built up during a judicially ordered stay. As to Northern's customers who "have made a showing that they have made no increases to their customers of any kind during the period of the stay, and so have not passed along the amount paid by them to Northern under the stay . . .", the court held that such customers of Northern were entitled to retain the refund. However, the court did not focus on the question of whether local regulatory agencies would have permitted these distributors to pass on the increases. In its stay order, the court stated in part:

> " 'The present direction of such payment has been made because the situation, on the hearing of the motion for stay, impressed as being one in which disposition of the question of the validity of the Federal Power Commission's order would be capable of being effected in this Court within a comparatively short period of time, so that the stay order as such would not in any event have to be continued long in effect; that it further seemed likely that the utility distributing companies would not have been able during that period to have secured generally from all of the local

city councils or other regulatory bodies involved [i.e. those having jurisdiction over the rates of the utility distributing companies], authority to make corresponding increases in their present rates, enabling them to pass on fully to ultimate consumers as a class the amount of the increase paid by them to Northern Natural during the stay period; and that in these circumstances and under these conditions, even if some part of the increase paid to Northern Natural might have been able to be passed on by some utility distributing company to some ultimate consumers the amount involved as to any such ultimate consumers individually for such brief period would be so small as not to warrant the Court, as a matter of practical judicial administration and in relation to the inabsoluteness inherent anyway in any utility charges [of a distributor subject only to local regulation in its rates] of assuming the burden of sifting out such individual ultimate consumers and attempting to make a trivial or nominal distribution to them.'" (215 F.2d at 897.)

The above language seems to indicate that the court was under the impression that the rate increase from which the refunds arose would have been permitted to be passed on to ultimate consumers had there been sufficient time for local regulatory agencies to take such action. But, California submits, no such assumption is proper. It should not be assumed that the "absorption" of a rate increase is a choice made by a utility to its own disadvantage and that the way is always clear to pass on the increase to the ultimate consumer. Rather, it should be assumed that a failure to take action to pass on the increase is a voluntary act of the utility presumably made in its own interest. California therefore submits that *Northern Natural* should not be followed.

In *United Fuel, supra,* the court deals with petitions by United to release the funds now in question. In denying the petitions the court relied on *Texas Eastern Transmission Corp. v. FPC,* 357 F.2d 232, (5th Cir. 1966) which dismissed as premature Petitioner's attempt to obtain judicial review of the Commission order instituting Docket No. RP66-12.

The *United* case does not appear to conflict with *Interstate* or the present decision. Rather, it appears to be consistent with *Interstate* and *Texas Eastern, supra,* in holding that it is for the Commission to determine how the funds should be distributed before such disposition can be review by the courts.

The holding in *Texaco, Inc.,* 27 FPC 847 (1962), cited by Petitioner, merely reflects the Commission practice before the instant case. However, a prior administrative interpretation does not prevent an agency from modifying an earlier practice. *American Chicle Co. v. United States,* 316 U.S. 450, 455 (1942). A rule to the contrary could result in the perpetuation of past errors. *Phillips Petroleum Co. v. Wisconsin,* 347 U.S. 672, 678 fn. 5 (1954).

5. The Commission's Decision Does Not Illegally Apply a Retroactive Change in Established Disposition of Refunds Under Section 4(e).

Petitioner does not dispute the holding of the court below that the Commission was not precluded from adopting a new policy toward supplier refunds where the pipeline had not filed tracking rate increases (Petition, p. 20). Petitioner contends, however, that the Commission could not retroactively apply the new policy to it.

It was for this reason that Petitioner was given the opportunity to show, risk-free, what it would have shown had it filed a tracking rate increase application. Petitioner chose not to avail itself of this opportunity. Moreover,

Petitioner chose not to challenge the Commission staff evidence that it was enjoying more than sufficient earnings. And, as the Commission pointed out:

> "... Texas Eastern has not even excepted to the Examiner's conclusion, fully supported by the record, that in each of the three years in issue Texas Eastern in fact earned substantially more than a reasonable rate of return on its investment. Under these circumstances there is no merit to the contention that it is inequitable to apply the policy enunciated in this decision to Texas Eastern." (Op. No. 540; R. 754-755.)

6. The Settlement Agreements Did Not Expressly Provide That Petitioner Is Entitled to Retain the Supplier Refunds at Issue.

Petitioner argues that it is entitled to the refunds at issue by virtue of specific provisions in settlement agreements which dictate this result.[4] It is California's understanding that the settlement agreements do not govern the issue and that there is no question here of undermining settlement agreements approved by the Commission. Any issue regarding these agreements is one of construction and interpretation of the contracts. Therefore, California contends that neither the order of the Commission nor the decision of the court below have an adverse impact on settlement contracts.

7. The Commission's Lack of Authority to Order the Payment of Refunds Directly to Ultimate Consumers Provides No Basis for Overturning Its Order in This Case.

Although Petitioner does not specifically allege that the Commission's lack of authority to order the payments of refunds directly to ultimate consumers is a ground for reversing its refund order in the instant matter, the ob-

4. Petition, pp. 23-24.

servation is made that "the Commission ordered the refunds paid to Texas Eastern's distribution company customers even though a substantial portion of the refunds will not be flowed through to consumers but will be retained by such distribution company customers."[5] As the court below stated:

> "The essence of Texas Eastern's approach is that a rational basis was lacking due to the dilemma posed by the Natural Gas Act in that the Commission has no authority over the ultimate disposition of the refunds by the distributors. The rates of the distributors are regulated by the states and whether the ultimate consumers will receive the refunds is withn the province of the state regulatory bodies. Federal Power Commission v. Interstate Natural Gas Company, supra; Central States Electric Company v. City of Muscatine, 1945, 324 U.S. 138, 65 S.Ct. 565, 89 L. Ed. 801. The Commission noted the limitation on its jurisdiction in this respect but assumed that the state regulatory authorities would discharge their respective responsibilities to benefit consumers. It pointed out that the regulatory commissions of California and New York had made clear their intentions in this regard. The Commission's view was that it was serving the statutory purpose of the Act of benefiting ultimate consumers by placing the refunds within the jurisdiction of the state regulatory authorities so as to place them in position to benefit the ultimate consumers. The Commission could not guarantee benefits for the ultimate consumers but absent its new policy there would be no way to benefit the ultimate consumers. We conclude that this was a rational basis for the Commission refund order. It was an approach to effective Federalism within framework and dictates of the Act." (414 F.2d at 350.)

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5. Petition, p. 9.

Although the jurisdiction of the Commission does not appear to reach the ultimate consumer, surely this fact does not relieve the Commission of its responsibility to administer its refund authority under Section 4(e) by doing all that is possible within its power to achieve the Act's purpose. Where the thrust of the Federal authority leaves off, it is for the state authority to take over so that the benefits of the Act extend to the ultimate consumer in one unbroken line.

California has never permitted Natural Gas Act refunds to be diverted from the intended beneficiaries of that Act —ultimate consumers. To have done otherwise would have been to frustrate the purpose of the Act upon reaching the final step necessary to its completion.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

MARY MORAN PAJALICH
J. CALVIN SIMPSON
LAWRENCE Q. GARCIA
RUFUS G. THAYER JR.

5072 State Building
San Francisco, California 94102

Attorneys for the People of the State of California and the Public Utilities Commission of the State of California

Dated: April 27, 1970

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969.

No. 1375.

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF OF PHILADELPHIA GAS WORKS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

WILLIAM T. COLEMAN, JR.,
ROBERT W. MARIS,
EDWARD F. MANNINO,
DILWORTH, PAXSON, KALISH & LEVY,
2600 The Fidelity Building,
Philadelphia, Pennsylvania. 19109
Attorneys for Respondent,
Philadelphia Gas Works
Division of UGI Corporation.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-5711 Area Code 215

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TEXAS EASTERN TRANSMISSION CORPORATION,
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BRIEF OF PHILADELPHIA GAS WORKS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

When the Federal Power Commission began to regulate the prices charged by independent producers for sales of natural gas in interstate commerce, following this Court's decisions in *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672, and *Atlantic Refining Co. v. Public Service Comm.*, 360 U. S. 378, the ordering of substantial price reductions and of substantial refunds resulted. Although this Court had uniformly declared that producer regulation was

required solely in order to protect the consumer, petitioner, an interstate pipeline company serving as middleman between the producer and the local distributor, has claimed for itself (and in effect its stockholders) these substantial refund amounts generated by producer regulation, on the theory that Section 4(e) of the Natural Gas Act deprives the Commission of power to protect the consumer. Therefore, the question presented by this case is:

1. Does Section 4(e) of the Natural Gas Act require the Commission to order the consumer-protective producer refund amounts here at issue paid to an intermediate pipeline (and in effect to its stockholders) and not to the consumer?

COUNTERSTATEMENT OF THE CASE.

The Philadelphia Gas Works Division of UGI Corporation, an intervenor in support of the Commission's order in the Court of Appeals for the Fifth Circuit below and a respondent here, files this Brief in Opposition to a Writ of Certiorari and in support thereof respectfully shows:

A. Nature of the Case.

This Court said, in the well-known *Catco*[1] case:

> "The purpose of the Natural Gas Act was to underwrite just and reasonable rates *to the consumers* of natural gas."
>
> "[L]ong delay . . . would provide a windfall for the [producer] natural gas company with a consequent squall *for the consumers.*" 360 U. S. at 388 (Italics added).

Following and specifically relying on the *Catco* decision, a number of Courts of Appeals in 1960 and 1961, reversed various Commission orders certificating essentially unexamined new sales by producers to pipelines at out-of-line prices.[2] On remand to the Commission these sales were generally settled or otherwise reduced in agreements and Commission orders involving refunds of many millions of dollars. Much of the money at stake in this case was the product of these court remands to the Commission. Therefore, it is especially important in this case to begin with a bit of history in order to understand that the escrowed fund here at issue did not drop from the sky, but is the product of a very spe-

1. *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378.

2. *E.g., UGI v. FPC*, 283 F. 2d 817 (9th Cir. 1960); 287 F. 2d 159 (10th Cir. 1961); 290 F. 2d 133 (5th Cir. 1961); 290 F. 2d 147 (5th Cir. 1961).

cific history in which the consumer protective orders of this Court and the various courts of appeals are directly involved and at stake.

The year 1954 marked the introduction of a significant new element into regulation under the Natural Gas Act—the exercise of jurisdiction over producers.[3] This exercise of jurisdiction was the direct product of the inability of existing regulation to cope with rapidly rising field prices charged by producers and the apparent inability of pipeline purchasers to combat the rise through private bargaining. The exercise of jurisdiction provided a forum and set off a decade and a half of litigation in which the principal antagonists were the producers on the one hand and consumer representatives, such as the Philadelphia Gas Works[4] and the other Eastern intervenors in this case, on the other hand.

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3. *Phillips Petroleum Co. v. Wisconsin,* 347 U. S. 672.

4. The Philadelphia Gas Works is a municipally owned distribution system which supplies natural gas to some 600,000 consumer customers within the City of Philadelphia. The Gas Works is operated for the City of Philadelphia under a management agreement by UGI Corporation (formally The United Gas Improvement Company), a privately owned corporation. Under this agreement UGI runs the Gas Works and performs all services in connection therewith for a fixed, specific and invariable yearly management fee, not based upon profits or earnings. The fixed fee constitutes one of the costs of operating the municipal gas works. Thus, under this arrangement no return over actual cost of operation goes to any private person or interest other than the City of Philadelphia and its consumer citizens, and the distribution of such return is determined from time to time by the City.

In the past PGW has actively participated in natural gas litigation sometimes under the style of The United Gas Improvement Company alone and sometimes, as here, under the style of the Philadelphia Gas Works Division of UGI Corporation.

Texas Eastern is a principal supplier of natural gas to the Philadelphia Gas Works and the Gas Works has participated actively in all litigation before the Commission involving Texas Eastern. In addition the Philadelphia Gas Works, under various names, has been active in all phases of producer regulation and its particular interest in the present proceeding is to see that the consumer-protective fruits of this participation are not dissipated.

The *UGI* cases cited in footnote 2, above, were among the landmarks in this producer-consumer contest. And it was this contest which produced the refund amount here at issue.

B. History.

1. *The First Phase: Prospective Regulation Under § 5(a).* The first phase of regulation under the Natural Gas Act, covering a period roughly from 1939 through 1952, involved the rigorous prosecution of major rate cases under § 5(a) against individual interstate pipeline companies.[5] The standard subject matter of these proceedings was the existing rate structure of a pipeline at the time of the passage of the Act.[6] Almost invariably the Commission ordered substantial prospective reductions in the existing rates of the pipelines investigated. These reduction orders were challenged by the pipelines, usually on the basis of the rate-making theory (*e.g.*, fair value v. original cost) used by the Commission. The orders were all ultimately sustained.

It was customary during this period, however, for the courts of appeals to stay the effectiveness of the § 5(a) orders pending review and to order the difference between existing and reduced rates to be paid into the court's registry. Therefore, when the orders were ultimately affirmed, the courts of appeals found themselves obliged to distribute the fund thus accumulated. Considerable litigation arose out of the proper disposition of these funds. *Central States Electric Co. v. City of Muscatine,* 324 U. S. 138; *FPC v. Interstate Natural Gas Co.,* 336 U. S. 577. During this

5. The Commission also dismissed various rate increase filings under § 4(e), usually within the statutory five month suspension period and without the increased rate going into effect. *E.g., Home Gas Co.,* 2 F. P. C. 402 (1941).

6. Two leading examples are the cases reviewed in *FPC v. Natural Gas Pipeline Co. of America,* 315 U .S. 575, and *FPC v. Hope Natural Gas Co.,* 320 U. S. 591.

period the usual transaction involved a sale by independent producers in the field (then not treated as jurisdictional) to *one* interstate pipeline, whose rates were jurisdictional, for resale to a distributor or industrial customer, also nonjurisdictional. Therefore there existed no "chain" of sales believed to be subject to Commission jurisdiction, and the ordering of refunds from one natural gas company to its immediate nonjurisdictional customers achieved the purpose of the Act. But see *FPC v. Interstate Natural Gas Co., supra.*

2. *Second Phase: Period of Rapidly Rising Producer Prices and Administrative Inaction.* In 1954 this Court held that sales by independent producers to interstate pipelines were indeed subject to the Natural Gas Act. Beginning somewhat before this (roughly coinciding with the end of the Second World War) and continuing until about 1961, there was a period of sharply rising producer field prices, which, despite the 1954 holding, were not subjected to effective regulation under either §§ 4, 5, or 7 of the Act (R. 75-76). One casualty of this rapid rise in field prices was the Commission's earlier program of selective review of pipeline rates under § 5(a). This came about because, as field prices rose, pipelines filed numerous rate increases under § 4(e) to pass along the impact of the increasing cost of purchased gas (R. 75-76). Although these increases were suspended and went into effect subject to refund, the sheer magnitude of the amounts involved, coupled with the burden of producer regulation, brought pipeline regulation under §§ 4 and 5 to a standstill as a practical matter. These various pipeline rate increases remained for all practical purposes unresolvable, because the principal cost on which they were based—producer rates—remained a contingent and unresolved matter.

The principal regulatory problem during the period 1954-1961 was the Commission's attempt to evolve a tech-

nique for the regulation of producer prices—first under §§ 4 and 5, and then under § 7. The history of individual company producer regulation and its abandonment because of ineffectiveness need not be detailed. But the most serious results of this regulatory uncertainty were the enormous delays—ultimately concluded in most cases by settlement. Hearings on producer rate increases were measured not in terms of five months (as originally contemplated by Congress) but of years. The serious impact of these delays was compounded where, as in the case of Texas Eastern, the impact was largely second-hand, through United Gas Pipe Line Company, Texas Eastern's principal supplier. In such a case, producer increases and decreases had their effect on Texas Eastern in a purely arbitrary pattern, depending on the business decisions of United, rather than on the safeguards provided by the Natural Gas Act. Moreover, because United's rate cases involved not only purchased gas cost increases, but also a multitude of unresolved zoning and allocation issues as well, consumer protection under § 5(a) was no longer possible in the case of Texas Eastern, since the numerous large contingencies underlying its rates destroyed all yardsticks by which § 5(a) could be applied.

Under these circumstances, and to attempt to achieve some price stability in a very unstable price situation, many pipelines and their customers would, from time to time, reach settlement agreements which amounted in effect to a compromise of purchased gas cost increases to that point and provided a temporary basis for stability until the spiral of field price inflation again disrupted the compromise plateau.

3. *Third Phase: Period of Relative Field Price Stability and Clearing of § 4(e) Pipeline Backlog.* Beginning, perhaps, with the second *Phillips* decision (Opinion 338, 24

F. P. C. 537 (1960)), *CATCO* [7] and the *UGI* series of cases [8] and taking still clearer direction with the major company-wide independent producer settlements and South Louisiana initial price settlements in 1961-63, a new phase of stabilized prices and increasing effectiveness of producer price regulation came into being (R. 76-77). As a result of this halt in the upward trend of field prices, the "pancaking" of unresolvable pipeline rate increases also went into a new phase. For example, United Gas Pipe Line filed a substantial rate increase at Docket No. RP63-1 on July 31, 1962 (its eighth successive filing in as many years). However, by the time it was placed in effect subject to refund on January 1, 1963, substantial reductions in the cost of gas purchased by United from producers had reduced the amount of the filed increase from some $5.6 million to only $1.6 million. *United Gas Pipe Line Co.*, 31 F. P. C. 1180, 1184 (1964). At the same time, the Commission had initiated new procedures for expediting pipeline rate cases and a hearing was actually held as to United's rates. By the close of the record, United's original increase had, as the result of further producer reductions, become a net *decrease* of almost $600,000 as of August 30, 1963. *Ibid.* Thus the Commission, almost for the first time in its regulatory history, was faced with the proper disposition of enormous refund amounts generated under § 4(e) in dockets involving a chain of three or more sales subject to its jurisdiction.

C. Specific Background of the Present Case.

1. *Texas Eastern Rate Settlement.* Because Texas Eastern came into existence at the end of the first phase discussed above, it has never been the subject of a Commission

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7. *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378.

8. *UGI v. FPC*, 283 F. 2d 817 (9th Cir. 1960); 287 F. 2d 159 (10th Cir. 1961); 290 F. 2d 133 (5th Cir. 1961); 290 F. 2d 147 (5th Cir. 1961).

rate order entered after full hearing, whether under Section 4(e) or Section 5 of the Act. Instead, its rates have been either those initially approved in its original certificate or those agreed to in settlements. Texas Eastern's first settlement, in rate increase docket No. G-1964, was litigated in *Texas Eastern Transmission Corp. v. FPC,* 306 F.2d 345 (5th Cir. 1962). Rate increases were subsequently filed by Texas Eastern in Docket Nos. G-12706 and G-18841. It was impossible to conduct a normal hearing under § 4(e) as to these rate increases in the manner done during the first phase of pipeline regulation discussed above, because of the fact that one of the principal cost items involved—the cost of purchased gas—was subject to contingency twice over. That is, the rates charged to Texas Eastern by its principal supplier, United Gas Pipe Line, were contingent and subject to refund under United's various Section 4(e) filings and United's Section 4(e) filings, in turn, were based largely on producer rate increases or high, out-of-line initial prices which were themselves contingent and subject to refund (R. 74-77). This situation was an unexpected and unfortunate by-product of the problems of producer regulation and delay which have been before this Court a number of times during the past decade.

Therefore, the rate increases filed at Docket Nos. G-12706 and G-18841 were settled by all parties in an agreement which sought to consolidate and compromise purchased gas cost increases of the past. For this reason the settlement agreement attempted to take into account the potential resolution of the various contingent cost increases already filed for, which underlay Texas Eastern's rate increase and specifically provided for flow-through of rate reductions and refunds in existing dockets.

2. *Commission Attention to Refunds.* As the third phase of regulation described above proceeded, the change

in regulatory posture was marked by the generation of large refund amounts ordered by the Commission in various independent producer certificate and rate increase dockets. The proper disposition of these amounts—generated in a legal context of producer-consumer contest—presented a novel regulatory problem. Since the Natural Gas Act mandates the protection of the consumer from excessive rates, and the courts and the Commission had ordered independent producers to refund substantial amounts on the theory that such refunds would protect the consumer, the Commission undertook to study the question of whether the Act at the same time mandated that such consumer protective funds must be paid the shareholders of intermediate pipelines. Therefore, it began to order the refunding producer to hold the funds in question pending a Commission determination of whether the Act deprived the consumer of this protection. The first major order establishing this approach was entered in *Humble Oil & Refining Company,* 32 FPC 49 (July 8, 1964).

The orders most directly involved here are the one issued as part of the Commission's Opinion 428-A, 32 FPC 687 (1964), and the one superseding it as part of the Order settling all of United's rate increase dockets on December 23, 1964. 32 FPC 1515 (1964). In these orders the Commission required United to hold the refunds representing disallowed rate increases and reductions below earlier rate levels, pending determination by the Commission of whether the Act required their payment to Texas Eastern.

3. *The Present case.* The procedural history of the present case is adequately outlined in the Statement in Texas Eastern's petition; but of course these specific proceedings cannot be understood properly outside the regulatory context described above.

REASONS FOR DENYING THE WRIT.

The issues actually presented by this case are narrow, unique and non-recurring. They do not fall under any of the criteria articulated by this Court in its Rule 19 1(b) as justifying time-consuming consideration upon Writ of Certiorari.

1. The Present Case Is of Limited, Purely Administrative Significance and Has Been Fully Examined by the Commission and Court of Appeals.

As the history set forth in the Statement reveals, the present case does not involve one of the fundamental questions of jurisdiction or regulatory method under the Natural Gas Act, such as engaged this Court's attention in the *Phillips* case,[9] in *Catco*,[10] in the *Rayne Field* case[11] or in the *Area Rate* case.[12] Rather, it involves a one-time, unique exercise of the Commission's discretion in carrying out the administration of its clear regulatory duties under those cases. Once the extent of the Commission's jurisdiction over the price of producer sales had been made clear by this Court, together with the Commission's duty to scrutinize such prices carefully, the generation of the refunds here at issue was inevitable. Confronted with these refund amounts, the Commission had, as a practical matter, only three kinds of action open to it, two of which were clearly illegal under this Court's decisions:

(1) to countermand its previous (court-affirmed) Section 4 and 7 orders and allow the producer natural gas companies to retain the consumer-protective refund

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9. *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672.

10. *Atlantic Ref. Co. v. Public Service Comm'n.*, 360 U. S. 378.

11. *United Gas Improvement Co. v. Continental Oil Co.*, 379 U. S. 958.

12. *Permiam Basin Area Rate Cases*, 390 U. S. 747.

amounts to which they had previously been found not to be entitled;

(2) to order the refund funds to be paid without further investigation to an intermediate pipeline, such as Texas Eastern, which, since it was otherwise solvent,[13] would necessarily receive the fund as a windfall to its stockholders; or

(3) to order the refunds to be flowed through to the limit of the Commission's jurisdiction, with reliance upon local regulatory authorities to order the final flow-through which would return the refunds to the pocket of the consumer.

The Commission chose the third course, announcing that it would be followed in all future cases. This decision was clearly the only one legally and equitably open to it.[14] Even Texas Eastern half concedes in its petition to this Court (p. 20) that the Commission was not precluded from adopting a reasonable general policy to deal with this new problem. The court below was clearly reflecting the tenor of this Court's rulings in this area when it held:

> "Our view is that the Commission was authorized to see to disposition of the refunds in question on the

13. Though offered full opportunity to do so below, Texas Eastern chose not to present any evidence on the issue of its solvency during the period at issue. Evidence introduced by the Staff confirmed its solvency.

14. Texas Eastern's narrow emphasis on the word "refund" alone in Section 4(e) is entirely misplaced. Even if its narrow reading of the word "refund" itself were conceded (and the reading is certainly not the only one possible), the Commission would still have discretion not to follow it where rigid adherence could lead to an absurd and inequitable result, as in the present case. The discretionary word "may" in Section 4(e) governs the word "refund" and embodies the broad Congressional intent. This clearly confers power in conjunction with Section 16 of the Act to deal equitably with disallowed rate increases by producers as the Commission has done here.

basis of the purpose of the Act to protect ultimate consumers of natural gas." (Texas Eastern Petition, p. 32)

Therefore, there really exists in the present case only the limited question of whether the Commission's treatment of Texas Eastern's individual case was fair. This is not an issue of general importance, either to administrative law generally, or the administration of the Natural Gas Act in particular. The Commission's approach was fair. It was fully and carefully examined by the Court below before its decision affirming the Commission and then thoroughly reexamined again upon rehearing, with the aid of two additional sets of briefs. There is no need for this Court to expend its time for the further examination of this *sui generis* issue, when the opinion of the court below is so thorough and correct and the only issue now at stake is the limited one of whether Texas Eastern stockholders in this particular instance shall or shall not enjoy a windfall of refund amounts at stake.

2. The Decision Below Is Not in Conflict With Any Decision of This Court or Another Court of Appeals.

In its petition, Texas Eastern attempts to show alleged conflict between the decision below and other decisions of this Court and various courts of appeals. Texas Eastern discusses both the issue of reparations (pp. 14-15) and the issue of the proper distribution of refunds (pp. 15-19). Understandably, Texas Eastern does *not* point out the internal contradiction latent in its own argument on these points.

This Court, in *FPC v. Interstate Natural Gas Co.*, 336 U. S. 577 (cited by Texas Eastern on the distribution issue), clearly points out:

> "[I]t is not ratemaking to determine the equity of the claim of the pipe-line companies [here Texas Eastern] to the fund." 336 U. S. at 582.

Thus the action of the Commission in this case was not rate making, either prospective or retroactive, and no issue of reparations is present here.[15]

Likewise, the Commission's decision below was in full harmony with the principles set forth in the *Interstate* case for correcting " 'that which has been wrongfully done by virtue of its process.' "[16] 336 U. S. at 582. It undertook to weigh all the legal and equitable factors bearing on a disposition of the fund that would best put all the parties in the position they would have been in had regulation of all the parties involved—producers and intermediate pipelines, as well as Texas Eastern—been instantaneous, instead of long delayed as it was. The Commission's action here was discretionary and has been affirmed by the court of appeals. Therefore, even if this Court might theoretically have reached a different result, had it been sitting as the Commission, the Commission's exercise of discretion clearly had a basis in reason. There is no need to re-evaluate that exercise on a Writ of Certiorari.

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15. "Reparations," of course, are the amounts ordered paid when a Commission (having that power) investigates the filed rates of a regulated company for a given past period, finds those rates to have been too high, fixes lower ones, and orders reparation of the difference. Here, no change has been ordered in any of Texas Eastern's past filed rates to its customers.

16. In *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U. S. 223, this Court said: "An agency, like a court, can undo what is wrongfully done by virtue of its order." 382 U. S. at 229.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM T. COLEMAN, JR.,
ROBERT W. MARIS,
EDWARD F. MANNINO,
2600 The Fidelity Building,
Philadelphia, Pennsylvania 19109
Attorneys for Respondent,
Philadelphia Gas Works
Division of UGI Corporation.

Of Counsel:
DILWORTH, PAXSON,
KALISH & LEVY.

Dated: April 28, 1970.

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1375

TEXAS EASTERN TRANSMISSION CORPORATION,
PETITIONER

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27-37) is reported at 414 F. 2d 344. The original opinion and order (No. 540) of the Federal Power Commission (Pet. Supp. 2-30)[1] is reported at 39 FPC 630. The Commission's opinion and order

[1] "Pet. Supp." references are to the separate supplement to the petition for a writ of certiorari.

(Opinion No. 540-A) denying petitioner's application for rehearing (Pet. Supp. 32-37) is reported at 40 FPC 62.

JURISDICTION

The judgment of the court of appeals (R. 781) affirming the Commission's orders was entered June 20, 1969. A petition for rehearing was denied December 30, 1969 (R. 793), and the present petition was filed March 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, as amended, 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Commission, having found refunds to be due from a supplier of natural gas sold in interstate commerce for resale, has authority to require the refunds to be passed on to the jurisdictional customers of the purchasing utility.

2. Whether the Commission and the court below properly concluded that the exercise of such authority here was in no way inconsistent with any rate settlements previously approved by the Commission.

STATUTE INVOLVED

Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), 52 Stat. 822, provides:

> Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State com-

mission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natu-

ral-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

STATEMENT

Introduction.—In the early 1960's the Commission disposed of a substantial number of natural gas pipeline rate cases and ordered refunds of several hundred million dollars. A subsequent survey revealed that not all of this money had been passed on to the ultimate consumers or even beyond the immediate pipeline purchasers. See F.P.C., *Forty-Third Annual Report* (1963), p. 127. Accordingly, the Commission announced in 1963 that it would, where appropriate, order the utilities liable for the refunds to hold them pending a decision on whether further proceedings would be required to determine who was entitled to receive the refunds. *Hunt Oil Co.*, 30 FPC 220, 222-223.

This case arises out of a proceeding, forecast by the *Hunt Oil* announcement and initiated October 4, 1965 (R. 666-674A, 34 FPC 1099), to determine the extent, if any, to which petitioner (a pipeline company) was entitled to certain sums collected from it which the Commission had ordered its suppliers to

refund (R. 672). The Commission, after the hearing, held that petitioner had not established its entitlement to the refunds and remanded the case to its examiner to consider certain further matters relating to the disposition of the refunds in favor of the ultimate consumer (Pet. Supp. 29-30). The refunds specifically involved in this proceeding are in excess of $10 million (Pet. Supp. 3) and represent the disallowed portions of rate increases collected by Texas Eastern's suppliers during the years 1961-1964, inclusive.

Throughout the period in question, petitioner charged rates, established in a settlement approved by the Commission in 1961 (R. 290-334, 25 FPC 172), based on a cost of service reflecting gas purchase costs through October 27, 1959, and allowing rates of return of 6 to 6.25 percent (R. 303-304, 333-334). The cost of service was based in part on suppliers' contingent rates and petitioner agreed to flow through to its customers refunds that it might receive from its suppliers with respect to specified contingent rates (see R. 294-295, 307, 320-322). The settlement was, however, silent as to refunds that petitioner's suppliers might be obligated to make with respect to rate increases filed after October 27, 1959; it is such refunds that are in issue here.

The Commission Proceeding.—The uncontradicted evidence before the Commission showed that, even though petitioner had paid the higher contingent rates of its suppliers without filing tracking rate increases to pass the increased costs on to its customers, it had realized after-tax rates of return of 6.59,

6.81 and 6.91 percent, respectively, in the years 1962, 1963 and 1964 (R. 583-606).[2] The highest rate of return theretofore allowed by the Commission for any major pipeline had been 6.5 percent (R. 670).

The Commission affirmed the examiner's findings and conclusions (R. 680-723) that petitioner had earnings during the years 1962-1964[3] in excess of a reasonable rate of return, and had failed, therefore, to show entitlement to the refunds (R. 687-688, 702). It also held, as had the examiner, that petitioner's 1961 settlement did not govern the disposition of the refunds here at issue (R. 700-701). The Commission explained that the mere fact that a pipeline had "absorbed" increased supplier costs, in the sense that it had not filed tracking increases, should not automatically entitle it to the refunds if, as here, it nonetheless had enjoyed earnings in excess of a reasonable rate of return. Indeed, under such circumstances, the filing of tracking rate increases would have exposed the pipeline to the possibility of a rate reduction (Pet. Supp. 14-16). The Commission stated that, because it had not in the past announced a firm policy with respect to untracked rate increases, it had given petitioner an opportunity to show that

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[2] Petitioner's pre-hearing "report" that it had earned less than 6.5 percent in the years 1962-1964 (Pet. 8, n. 3) was unsupported.

[3] The Commission staff had presented no evidence as to petitioner's earnings in 1961 as to which refunds were also applicable. The Commission held that the burden of showing entitlement was petitioner's and that it had failed to carry that burden with respect to either 1962-1964 or 1961 (Pet. Supp. 34-35).

it was entitled to the refunds, but that claims to refunds accruing in the future would not be permitted to be premised on the failure to track increases or on claimed revenue deficiencies during the period of accrual (Pet. Supp. 16-20).

The Commission further determined that the ultimate gas consumers should be the beneficiaries of the refunds at issue and accordingly ordered the refunds to be flowed through to the extent of the Commission's jurisdiction. Thereafter it would be within the jurisdiction of local regulating bodies to decide their ultimate disposition. The Commission noted that the California and New York commissions had stated their intentions to assure that the ultimate consumers would be the beneficiaries of refunds flowed through to local distributors (Pet. Supp. 11-12).

The Decision Below.—The court of appeals affirmed the Commission in all respects (Pet. App. 27-37). Interpreting the power of the Commission to order refunds under Section 4(e) of the Natural Gas Act in light of the overriding purpose of the Act to protect consumers, the court rejected petitioner's claim that its "absorption" of the increases automatically entitled it to the refunds (Pet. App. 31-34). The court also found that the Commission's past actions did not bar the adoption of a new refund policy, that the Commission's order was not a reparations order, and that the entitlement to the refunds was not governed by the 1961 settlement agreement of petitioner's rates or by Commission orders disposing of other supplier rate increases (Pet. App.

34-36). Finally, the court of appeals found the Commission's order rationally based, noting that, although there was no guarantee that the ultimate consumers would benefit from the refunds, there would be no way for them to be benefitted unless the Commission ordered the refunds flowed through so as to be subject to the jurisdiction of the state regulatory agencies (Pet. App. 36-37).

ARGUMENT

The question whether the Commission in ordering refunds under Section 4(e) of the Natural Gas Act may require the immediate purchaser to flow them through to its customers so as to permit reimbursement to the ultimate consumer is concededly one of general interest and importance. The present case represents the Federal Power Commission's first formal and comprehensive consideration of this problem. Nevertheless, we do not think that the case calls for further review by this Court as the unanimous decision below is plainly correct, conflicts with no other decision, and was foreshadowed by this Court's decision in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, dealing with the disposition of funds accumulated under a stay.

1. Under Section 4(e) of the Natural Gas Act, the Commission clearly has the authority to order refunds of amounts collected during the pendency of rate increase proceedings. No requirement that the refunds be paid to immediate purchasers is imposed. Indeed, as the Commission and court below concluded, such a requirement would be plainly inconsistent

with the Act's overriding purpose of protecting the ultimate gas consumers.

Petitioner's attempt to find a restriction on the ultimate recipient of refunds in the Section 4(e) requirement that a utility receiving a contingently increased rate "keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid" was properly rejected by the court below (Pet. App. 32). This accounting provision does not purport to specify who is ultimately entitled to the refunds.

2. Petitioner's underlying thesis in attacking the Commission's authority to pass the refunds on to petitioner's customers is that its abstention from raising its own rates to track its suppliers' increases in rates entitles it automatically to any later refunds the suppliers might be required to make. Such a disposition, it is argued, would restore the situation to what it would have been if its suppliers had not originally been granted the contingent rate increases. As the record establishes, this assumption cannot be supported.

The evidence before the Commission established that even after absorbing the increased gas purchase costs imposed upon it, Texas Eastern's after-tax rates of return from 1962-1964 were well above the 6.25 percent return limit which formed the basis of the 1961 Texas Eastern rate settlement. Had increased gas purchase costs not been imposed during these years, the pipeline's rates of return would have been substantially higher, rendering it more likely

that the Commission or one of petitioner's customers would have instituted rate reduction proceedings against petitioner.

If petitioner, on the other hand, had filed for a rate increase to track the increased costs contingently charged by its suppliers, it is probable that the Commission not only would have disallowed the rate increase and have required, in accordance with its regular practice (see, *e.g.*, *Midwestern Gas Transmission Co.*, 32 FPC 993, 1003, 1005), the flow through of any refund received in the future from its suppliers resulting from contingent increases, but would have reduced petitioner's existing rates.

Contrary to the claim of petitioner (Pet. 15-19), the Commission's decision plainly gave full consideration to relevant equitable principles and was fully consistent with this Court's decision in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577.[4] In *Interstate* the Court was faced

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[4] The other alleged conflicts (Pet. 17-19) are also nonexistent. In *Northern Natural Gas Co.* v. *Federal Power Commission*, 215 F. 2d 892 (C.A. 8), the court, to be sure, concluded that distributors who had not increased their rates during the period of the court stay were entitled to a refund for their own benefit of excess amounts paid by them. But the court made clear the limited character of its ruling. At the time it issued its stay the court had, in effect, invited the distributors not to track. The court had stated its belief the stay would be of short duration, during which time there probably would not be sufficient time for distributors to obtain approval of rate increases, and that the effect on individual consumers would probably be too small to warrant court proceedings to determine entitlement. 215 F. 2d at 897.

United Fuel Gas Co. v. *Federal Power Commission*, 367 F. 2d 34 (C.A. 4), also plainly poses no conflict. There the

with the question of the proper distribution of a fund created by a natural gas supplier during a judicial stay of a rate decrease ordered by the Commission; it recognized that the intermediate pipeline companies which had paid the high rates might be entitled to the fund either if their own rates had been unreasonably low or if they had passed on the rate reductions to their customers at the time of the Commission's original order. But, the Court held, "apart from those exceptions, it is the duty of the court [which was required to dispose of the fund its stay had created] to look beyond those companies for the rightful claimants of the fund" in accordance with equitable principles (336 U.S. at 582). Moreover, the Court noted that the ultimate consumers of natural gas were "the intended beneficiaries of rate reductions ordered by the federal commission, though state machinery might have to be invoked to obtain lower rates at the consumer level" (*id.* at 581).

The present case involves neither of the circumstances that the Court in *Interstate* indicated would justify a refund to the pipeline company. Texas Eastern's earnings during the period in question were not low, and the "absorption" of the supplier rate *increases* is not the equivalent of a tracking rate *reduction* in the *Interstate* situation. Whereas a

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court, without reaching the merits, dismissed as premature an order directing a supplier to withhold refunds pending the Commission's decision as to the proper distribution. The fact that the court stated that there had to be a determination as to "who bore the burden of the excessive rates" plainly does not aid petitioner since, as we have shown, Texas Eastern in fact did not bear any burden from its suppliers' excessive rates.

change in rates, up or down, exposes a pipeline company's revenue position to Commission analysis and evaluation, Texas Eastern's unilateral conclusion that it was satisfied with the status quo despite its suppliers' increases gave no assurance whatever that its own charges were in fact just and reasonable. Under these circumstances, the Commission properly determined that the consumers are the rightful claimants of the refunds, and did everything within its jurisdictional power to assure that they would receive them.[5]

3. Petitioner's attempt (Pet. 14-15) to equate the Commission's requirement that refunds be paid to its jurisdictional customers with reparations (which neither the Commission nor the courts concededly have the power to order) is also without substance. This Court held in *Interstate* that the determination of the equitable entitlement to a fund created because

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[5] Petitioner surprisingly asserts (Pet. 10) that the Commission's response to the petition for rehearing before the court of appeals "acknowledged that its orders would produce 'an inequitable result' because a substantial portion of the refunds would not be flowed through to consumers but would be retained by Texas Eastern's customers." The three-word phrase quoted by petitioner appears in the context of a discussion pointing out that in view of the interplay of federal and state regulatory responsibilities the distribution of refunds to retail customers, whether under a stay as in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, or under a Section 4(e) proceeding, depends ultimately on a State determination of the relative equities between the distributor and its customers even if that State determination "leads to what the F.P.C. might believe is an inequitable result as between parties to contracts subject to its jurisdiction" (R. 784, p. 7).

of the pendency of rate litigation is not ratemaking, explaining that (336 U.S. at 582-583):

> * * * If in a particular case the court reaches the question of reasonableness of rates, it does so only for purposes of distributing the fund for whose creation it alone was responsible. * * * The reasonableness of rates charged by the companies who claim the fund is wholly ancillary to the problem of determining what claimants are equitably entitled to share in it.

See also *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229-230; *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9, 44-45.

4. Apparently conceding the Commission's authority to initiate a prospective policy of requiring refunds to be flowed through to the jurisdiction of local regulatory agencies, petitioner claims that it has been subjected to an improper retroactive application of the policy (Pet. 19-22).[6] As the court below noted (Pet. App. 34-35), such a policy had not been specifically rejected in the past, but had gradually developed over the years in a manner typical of the administration of the Natural Gas Act.[7] Moreover, recognizing

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[6] The excess charges on which the refunds were based were collected in the period 1961-1964 (Pet. Supp. 3). The Commission gave notice on July 16, 1963, *Hunt Oil Co.*, 30 FPC 220, 222-223, that it would no longer assume that refunds made to the immediate purchaser carried out the consumer-protection purpose of the Act.

[7] The problem of flowing through refunds involved here arises in the context of Section 4 increase proceedings. During the early administration of the Gas Act, there were practically

the novelty of its ruling, the Commission afforded petitioner an opportunity, not to be granted with respect to refunds accruing in the future, to show that its rates or return were below the just and reasonable level during the period when it paid the excess charges (Pet. Supp. 18-20). The evidence developed, however, demonstrated that petitioner's rates of return, without taking the refunds into account, were excessive. In short, the Commission's determination that the policy of the Act requires that refunds be flowed through to those who can be ordered by state agencies to pass them on to consumers was both rational and equitably applied in this case.

5. Petitioner's separate claim (Pet. 22-24) that the action here will impair future reliance on settlements to resolve rate disputes rests on its suggestion that the terms of prior settlements were ignored by the Commission and the court below. There is no question but that such settlements are binding on matters governed thereby; the Commission and the court of appeals merely rejected petitioner's construction of the settlements. Petitioner has seized upon orders approving settlements of rate increase proceedings by its suppliers[8] (Pet. 24) to claim that the Commission

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no such proceedings. The Commission has only relatively recently become aware of the existence and extent of the problem of securing for ultimate consumers the benefits of refunds. See Federal Power Commission, *Forty-Third Annual Report*, p. 127. Until the problem became apparent, refunds when required were paid to the immediate customer—frequently a distribution company.

[8] Petitioner, however, apparently no longer challenges the self-evidently correct holdings below that its own 1961 set-

had made an irrevocable decision that petitioner was entitled to the refunds therein referred to because those orders either specified that the refunds were to be paid to jurisdictional customers [9] or listed the dockets, customers and amounts of refund in each docket.[10] As the Commission stated (Pet. Supp. 28-29) and the court below noted with approval (Pet. App. 36), however, those proceedings were concerned, not with the beneficiaries of the refunds, but solely with the lawfulness of the rates there at issue. Accordingly, the claim that the Commission's decision in this case will impede future use of settlements is clearly without merit.

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tlement, based on gas costs as of October 27, 1959 (R. 320-333), did not bar the Commission's flow-through order here involved, relating to excess charges resulting from supplier rate filings after that date (Pet. App. 35-36; Pet. Supp. 26-28).

[9] *Texas Gas Transmission Corp.*, 26 FPC 924; R. 650-658.

[10] *United Gas Pipe Line Co.*, 27 FPC 504, R. 153-192.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

GORDON GOOCH,
General Counsel,

PETER H. SCHIFF,
Solicitor,

ABRAHAM R. SPALTER,
Assistant General Counsel,
Federal Power Commission.

MAY 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1375

TEXAS EASTERN TRANSMISSION CORPORATION, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

AMICUS CURIAE BRIEF OF INDEPENDENT NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Pursuant to the consent of the parties, the Independent Natural Gas Association of America ("INGAA") presents this brief in support of Texas Eastern's petition for writ of certiorari filed on March 30, 1970.

INTRODUCTION

The Opinion of the court below is appended to Texas Eastern's petition. Likewise, the jurisdictional requisites and statutory provisions involved are set forth in such petition.

INTEREST OF INGAA

INGAA is a non-profit trade association, whose membership includes virtually all of the interstate natural gas pipeline companies subject to the jurisdiction of the Federal Power Commission under the Natural Gas Act (15 USC 717-717w). For many years, INGAA has appeared in rule making, rate and certificate proceedings before the Commission when issues affecting the general interests of the natural gas industry were involved. In this case, INGAA participated as an intervenor in support of Texas Eastern before the Commission and in the court below.

If the judgment of the court below is not reviewed by this Court, a new rule will have been established which will have subtsantial and immediate impact not only on Texas Eastern but on many other pipeline companies which are members of INGAA, and which, like Texas Eastern, absorbed rate increases filed by their suppliers in the expectation that when and if such increases were disallowed by the Commission, they would be entitled to claim and retain the amounts refunded. INGAA believes that the Commission's orders not only violate the Natural Gas Act but are fundamentally inequitable. Their effect, if sustained by this Court, will be industry-wide.

QUESTIONS PRESENTED

While INGAA believes that Texas Eastern's statement of Questions Presented fairly sets forth the basic issues involved in this case, INGAA's attention will be primarily focused on the following two questions:

1. Do the Commission's orders under review sanction an award of "reparations" contrary to the pro-

visions of the Natural Gas Act and controlling decisions of this Court?

2. Assuming reparations are not involved and the Commission has power to decide entitlement to supplier refunds, are the orders of the Commission and the decision of the court below in conflict with *FPC* v. *Interstate Natural Gas Co.,* 336 U.S. 577 (1949) and cases following, since it is undisputed that Texas Eastern "absorbed" the supplier rate increases which produced the subject refunds?

STATEMENT OF THE CASE

INGAA adopts the statement of the case made by Texas Eastern and will only relate such of the facts of the case as are necessary to an understanding of the points made in this brief.

In January 1961, the Commission approved a negotiated settlement of Texas Eastern's pending rate increase applications under Section 4(e) of the Natural Gas Act. It was agreed that Texas Eastern would flow through to its customers any supplier refunds (i) which were attributable to gas purchased during the period the settlement rates remained in effect and (ii) which resulted from the disallowance of any of the 520 specified supplier rate increase proceedings included in the cost of service used to fix the settlement rates. Texas Eastern was under no obligation to flow through any refunds it was entitled to receive as a result of the disallowance of (a) any of the 173 additional supplier rate increase proceedings filed before the settlement contract was approved and which were not included in the cost of service or (b) any supplier rate increases filed subsequent to the settlement.

Although its suppliers subsequently filed and collected additional rate increases subject to refund between 1961 and 1964, totaling approximately $20 million in excess of the costs used to establish the 1961 settlement rates, Texas Eastern did not attempt to increase its rates to pass on any of the additional costs to its customers but consistently sold gas to its customers at the rates fixed by the 1961 settlement. Certain of the supplier rate increases were disallowed and refunds required by the Commission pursuant to Section 4(e) of the Natural Gas Act, 15 U.S.C. § 717(c)(e). This case is concerned with the disposition of the refunds which Texas Eastern is not obligated by its 1961 settlement to flow through and which, at the time the settlement was made, it had every reason to believe and expect it would be allowed to retain.

In Opinion 540, issued May 3, 1968, the Commission ordered Texas Eastern to flow through all refunds in question. The Commission held that a pipeline's only protection against supplier rate increases would be the filing of its own "tracking" rate increases under Section 4. Since it was too late for Texas Eastern to file such increases with respect to supplier rate increases it had paid during 1961 through 1964, the Commission held that Texas Eastern was not entitled to any of the refunds because the Commission-approved rates charged its customers during the years 1962 through 1964 had resulted in Texas Eastern earning more than the rate of return the Commission in 1968 believed should have been earned during each of these past years. Accordingly, Texas Eastern's absorption of the rate increases which produced the subject refunds, plus the related fact that its customers' rates were not thereby increased, were not deemed to be controlling.

The Commission attempted to avoid the prohibition against reparations on the ground that it was neither recomputing Texas Eastern's past rates nor requiring Texas Eastern to refund amounts collected under its established rates. The court below affirmed on the ground that the Commission had the power of disposition over the refunds and therefore no question of reparations was involved.

REASONS FOR GRANTING THE WRIT

1. The far-reaching significance of this case is beyond dispute and for the most part has been conceded by all parties. This is true not only of the potential impact of the Commission's orders in question on numerous other pipeline companies, but also from the more general standpoint of the Commission's administration of its statutory power under the Natural Gas Act. In reaching its primary legal conclusion that Section 4(e) permitted the Commission to order payment of supplier refunds to parties other than Texas Eastern, the Commission departed from the plain meaning of Section 4(e) and repudiated its interpretation of such section consistently adhered to for many years. The new approach to its powers over disposition of refunds is predicated on certain general statements by this Court to the effect that the purpose of the Act was consumer protection. See *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Atlantic Refining Co.* v. *Pub. Serv. Comm'n*, 360 U.S. 378, 388 (1959) (R. 745).

Thus, the Commission's legal theory is that it has plenary power to take any action it deems to be in the interest of ultimate consumers unless such action is expressly forbidden by the language of the Natural Gas Act. Moreover, where the express language does

forbid Commission action—as INGAA and Texas Eastern have contended is the case here—the Commission is free to disregard such language if contrary to the Commission's notion of what is required for consumer protection (R. 739). The courts, says the Commission, must go along if the Commission's interpretation and application of the statute has a "rational basis" (R. 739). The court below upheld Commission power over refunds on the basis of the "overriding purpose of the Natural Gas Act" as articulated in this Court's *Hope* and *CATCO* decisions. 414 F.2d at 347-48.

INGAA submits that the rationale of the Commission and the court below fits so poorly the actual regulatory situation confronting the Commission as to call into serious question the viability of the rationale itself. The Commission lacks jurisdiction over Texas Eastern's distribution company customers and their dealings with ultimate consumers. Obviously, a substantial portion of the refunds to be received by these customers under the Commission's orders will be attributable to industrial sales by such customers where there is absolutely no possibility of flow-through to ultimate consumers. Under any conception of equity and fair play it would have to be admitted that Texas Eastern has a superior claim to those refunds, but the Commission nevertheless ordered all of such refunds paid to Texas Eastern's customers. The general statements of this Court in *Hope* and *CATCO* are not a sufficient basis for the holdings below with the attendant illogical, unfair and imprecise results described above.

From this Court's recent decision in *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968), it is apparent that the

language of Section 4(e) of the Natural Gas Act should first be read for what it says, and that there are limits to what can be justified by reference to the overall purpose of the Act. There, this Court refused to order refunds below the level of permanently certificated rates filed with the Commission under Section 4 when it was subsequently determined that the "just and reasonable" rate was lower than the certificated rate. As recognized by the Court, the language of Section 4(e) did not expressly confine the Commission's refund powers in that instance, 391 U.S. at 23-24, but the Court presumably felt that the result was required by a fair construction of Section 4(e). This was done in spite of the fact that it is obvious that the refunds (the Commission's apparent index of consumer protection) would have been far greater had the Court not held the Commission's powers to be restricted.

Thus as to the basic issue in this case—the nature of the Commission's powers under Section 4(e)—there appears to be a conflict between the application of this Court's general statements in *Hope* and *CATCO* by the Commission and the court below and this Court's construction of the specific section of the Act involved here in *Sunray*. This situation urgently calls for this Court's review.

2. No amount of camouflage can conceal the seriousness of the reparations question fairly presented by this case. This Court has repeatedly held, and the Commission conceded (R. 746), that it lacked power to award reparations under the Natural Gas Act. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944); *Montana-Dakota Util. Co.* v. *Northwestern Pub. Serv. Co.*, 341 U.S. 246, 254 (1951); *FPC* v. *Sunray DX Oil Co., supra,* at 23-24. The Commission says, however,

that in bypassing Texas Eastern in disposing of the refunds, "no retroactive review of the past firm rates charged Texas Eastern's customers is involved" (R. 3688); that it is not ordering Texas Eastern to reduce or refund any part of its firm rates established by the 1961 rate settlement. Indeed, says the Commission, this case is hardly a rate proceeding at all; if it may be so considered, 'It is one ancillary to the rate proceedings which fixed the rates of Texas Eastern's suppliers.' (R. 747). It apparently follows, from the Commission's point of view, that the order complained of is not a reparation order [1] and hence not beyond the powers granted the Commission under the Natural Gas Act.

The court below apparently accepted the Commission's rationalization and dismissed Texas Eastern's and INGAA's argument as presenting a "form over substance or substance over form question" and stated that such argument "begs the question," for: "If the Commission has, as we have held, the power of disposition over the refunds, then the question becomes one

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[1] The Commission and the court below have overlooked the fact that the Act forbids the award of reparations, not merely retroactive rate making, which the Commission insists is not involved here. See *Hope Natural Gas Co.* v. *FPC*, 134 F.2d 287 (4th Cir. 1943), where the Commission itself distinguished between reparations and retroactive rate making and concluded that it had neither power: "As the Commission itself says, it was not given authority *to fix rates for the past or to award reparations on account of past rates*" (134 F.2d at 310). While reversing on other grounds, *FPC* v. *Hope Natural Gas Co., supra*, p. 5, this Court affirmed the view of the lower court with respect to reparations in the following language:

> ". . . [I]t is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force', § 5(a) . . ." (320 U.S. at 618).

of entitlement and not of reparations." 414 F.2d at 349. Such sloganeering cannot disguise the reality of what the Commission did. It ordered flow-through of refunds because for the past period to which the refunds related Texas Eastern earned more pursuant to Commission apparent rates than the Commission subsequently deemed proper. Had the Commission concluded that Texas Eastern's earnings had been at an acceptable level, Texas Eastern would have been allowed to retain the refunds. This is clearly a "taking from" Texas Eastern and an "award to" its customers of the refunds in question. Whether the question is put as a determination of Texas Eastern's "entitlement" to receive and retain the refunds, or as whether Texas Eastern should be required to "flow through" such refunds,[2] the substance is the same, *viz:* whether Texas Eastern retains the refunds in question depends solely upon a review of the earnings generated by its past firm rates.

The conflict between the decision of the Commission and the court below on the one hand and the "prospective only"[3] scheme of regulation required by Sections 4 and 5 of the Act on the other, is clearly to be seen from this Court's decision in *FPC* v. *Sunray Oil Co., supra.* In discussing the propriety of the Commission's ordering producers to make refunds below "inline" prices, the Court stated:

> "We adhere to the dicta in *Callery* and *Sunray Mid-Continent.* That outcome comports better with the language of § 4(e) than does the alterna-

[2] The Commission has stated the question both ways (R. 134; Com. Br. 2).

[3] See *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 341 (1956).

ative. It is true that § 4(e) in terms gives the Commission power to refund 'the portion of such increased rates or charges' found to be excessive, and does not expressly limit the refund to the rate increase or increment. However, the accounting provision, which appears earlier in the same sentence, requires that the producer account only for the 'amounts received by reason of such increase.' If it had been intended that the refund obligation should extend to greater amounts, the accounting requirement logically should have extended to them also. Viewing the Act more broadly, there is another reason why this interpretation of § 4(e) is preferable. *It seems incontestable that if a producer consistently sells gas at the price specified in a final, permanent certificate, and does not attempt to increase his price, the Commission may not order him to make refunds simply because the just and reasonable rate for his area turns out to be below the in-line price. This would amount to a reparation order and this Court has repeatedly held that the Commission has no reparation power.*[10] It would be anomalous to treat an increased price as a trigger for a refund obligation which would leave the producer with a smaller net return than if he had never increased his price at all. We therefore consider and hold that an initial price which is authorized in a final, unconditioned permanent certificate is a lower limit below which a refund cannot be ordered under § 4(e)." (391 U.S. at 23-24, emphasis supplied).[4]

"[10] See e.g. Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 618; Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 340 U.S. 246, 254."

[4] The Court's construction of the Commission's Section 4(e) powers, wherein it referred to the accounting provision to shed light upon the extent of the Commission's power to order refunds, is likewise applicable here. The accounting provision of Section 4(e) requires the rate increase applicant "to keep accurate accounts in detail of all amounts received by reason of such increase,

To support its conclusion that reparations were not involved, the court below relied upon *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 582-83 (1949), and *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229-230 (1965). *Callery*, which is exclusively concerned with refunds in a Section 7 certificate proceeding, is in no way relevant. Invocation of *Interstate* by the court below reveals a fundamental misconception of what the Commission did here and what this Court did there.

Interstate involved distribution of a fund created by the court of appeals pursuant to an order staying a Section 5 rate reduction. Various pipeline purchasers sought restoration of amounts they paid pursuant to the excessive rates which remained in effect pursuant to the court's stay order. No question of reparations or retroactive review of earnings was involved in that case, contrary to the situation involved here. Justice Douglas observed that there was "no claim that their [the pipeline purchasers'] rates have been so low that they are entitled to these refunds as a matter of law" (336 U.S. at 582). This Court directed that an equitable distribution be made of the stay fund proceeds and specified an absorption test for determining the entitlement of the pipeline claimants to the fund, which as noted *infra*, the Commission erroneously disregarded.

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specifying by whom and in whose behalf such amounts were paid." The context of the sentence clearly indicates that "refunds with interest" may be ordered paid to those for whom the rate increase applicant is required to maintain accounts. INGAA submits that the Commission and the court below erroneously read this Court's statement in *Sunray* as being inconsequential to an appropriate construction of the Commission's Section 4(e) powers in the case at hand.

3. Should it be conceded for the sake of argument that the Commission has power over the disposition of refunds resulting from disallowed Section 4(e) rate increases, INGAA believes that the Commission would be required to make an equitable distribution of the refunds in accordance with the guiding principle set forth by this Court in the *Interstate* case. The Commission made no pretense of doing this. Determining that the approved rates charged by Texas Eastern for the relevant past period were excessive, the Commission made no effort to weigh comparative equities between Texas Eastern and its customers.[5] Instead, the Commission merely awarded such refunds to Texas Eastern's customers, knowing full well that a substantial portion of such refunds must inure not to ultimate consumers but to the exclusive benefit of the customer. In so many words, the Commission conceded that this result was "inequitable" (R. 758). Overlooking this aspect of the Commission's decision, the court below erroneously thought that the rationale of *Interstate* "buttressed" its affirmance of the results reached by the Commission, since in *Interstate,* "refunds, created by the court's staying rate reductions were awarded disbursed in accordance with *equitable principles* . . ." (414 F.2d at 349-49).

To the contrary, the action of the Commission is condemned by *Interstate,* where this Court articulated the test to be utilized by the court of appeals in making an "equitable" distribution of the fund in question (336 U.S. at 582):

> "Moreover, if the pipeline companies passed on to their customers the rate reductions from the date

[5] The Commission neither required nor heard evidence from Texas Eastern's customers as to any equitable claims they might have to the refunds.

> of the Commission's order (as Mississippi alleges it did), they would be entitled to a return of the payments they made into the fund. They would then have done all that was in their power to effectuate the policy of the Act in this regard. But apart from those exceptions, it is the duty of the court to look beyond those companies for the rightful claimants of the fund. It is the responsibility of the court which distributes the fund accumulated under its stay order 'to correct that which has been wrongfully done by virtue of its process.' *United States* v. *Morgan,* 307 U.S. 183, 197. That responsibility plainly cannot be discharged by payment of the fund to those who show no loss by reason of the court's action."

The principle of *Interstate,* applied there to pipelines which had passed on a rate reduction, applies equally as well to this case. Here, Texas Eastern, by not passing on the supplier rate increases, should be entitled to a return of the excessive payments it made to such suppliers. Likewise, Texas Eastern's customers, whose rates were not increased, can "show no loss by reason of" the supplier rate increases, Texas Eastern having absorbed the same.

The Commission seemed to think that it made a difference that a rate increase situation was presented here as distinguished from the stay of a rate reduction involved in *Interstate.* However, this is a difference without distinction, for in *Northern Natural Gas Co.* v. *FPC,* 215 F.2d 892 (8th Cir. 1954), the principle of *Interstate* was applied to a court-ordered stay of the Commission's disallowance of certain elements of a Section 4(e) rate increase. The conflict[6] between the

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[6] The court below did not mention *Northern Natural* or make any effort to resolve this irreconcilable conflict, presumably on the ground that the Fifth Circuit was not bound by the Eighth Circuit's decision. The conflict, however, should be resolved by this Court.

Commission's action as approved by the court below and the decision in *Northern Natural, supra,* is well illustrated by its treatment in California's brief, p. 14-15, where after an admittedly unsuccessful attempt to distinguish the case, "California therefore submits that *Northern Natural should not be followed.*" Thus, there exists a serious conflict between the results reached by the Commission and the court below and this Court's decision in *Interstate* and its progeny, which should be resolved on review by certiorari. See also, *United Fuel Gas Co.* v. *FPC,* 367 F.2d 34, 37 (4th Cir. 1966); *Northern Natural Gas Co.* v. *FPC,* 245 F.2d 447, 449-50 (8th Cir. 1957); *Northern Natural Gas Co.* v. *FPC,* 254 F.2d 466 (8th Cir. 1958).

CONCLUSION

For the foregoing reasons, INGAA submits that the writ of certiorari should be granted as prayed for by Texas Eastern.

Respectfully submitted,

JEROME J. MCGRATH
Counsel for Independent Natural gas Association of America

1660 L Street, N.W.
Washington, D.C. 20036

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JOHN E. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1375

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

REPLY OF PETITIONER TEXAS EASTERN TRANSMISSION CORPORATION TO BRIEFS IN OPPOSITION

DAVID T. SEARLS
J. EVANS ATTWELL
2100 First City National
Bank Building
Houston, Texas 77002

JACK D. HEAD
P. O. Box 2521
Houston, Texas 77001

Of Counsel

LYNN R. COLEMAN
PLATT W. DAVIS III

VINSON, ELKINS, SEARLS & CONNALLY
2100 First City National Bank Building
Houston, Texas 77002

FIDELITY PRINTING COMPANY, INC., HOUSTON

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REPLY OF PETITIONER TEXAS EASTERN TRANSMISSION CORPORATION TO BRIEFS IN OPPOSITION

Petitioner, Texas Eastern Transmission Corporation, submits this reply to the briefs filed by the Federal Power Commission, the Philadelphia Gas Works Division of UGI Corporation, and the Public Utilities Commission of the State of California in opposition to Texas Eastern's petition for a writ of certiorari to review the judgment entered on June 20, 1969 by the United States Court of Appeals for the Fifth Circuit.

1. The Commission recognizes "the novelty of its ruling" in this case and concedes that whether it may require Texas Eastern to flow through the subject refunds is a question "of general interest and importance" (Com. Br. 8, 14). California likewise contends that the principles established by the orders of the Commission and the decision below have widespread applicability, *i.e.*, will apply to all pipelines, not just to Texas Eastern (Calif. Br. 8-9). PGW alone argues that the "issues actually presented by this case are narrow, unique and non-recurring" (PGW Br. 11).

However, PGW's present position is one of convenience[1] rather than conviction, because in the court below it relied upon the "Wider Implications of the Present Proceeding," stating:[2]

> "However, the above discussion of background history reveals that the present case is an important, precedent-setting one in the whole area of producer regulation. The result reached in the present case will inevitably have an impact on large refund amounts to be generated by the future resolution of producer proceedings now pending before the Commission and in the courts, especially the major area rate proceedings."

2. While Texas Eastern disagrees with numerous arguments advanced by California, it is sufficient to note at this point that California admits the decision of the court below is in conflict with *Northern Natural Gas Co.* v. *FPC*, 215 F.2d 892 (8th Cir. 1954), and ". . . therefore submits that *Northern Natural* should not be followed" (Calif. Br. 14-15).[3] This admitted conflict between the Fifth Circuit[4] and the Eighth Circuit alone warrants the granting of certiorari. See Supreme Court Rule 19 1(b).

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[1] PGW is a division of UGI Corporation, a stockholder-owned utility, which will monetarily benefit if the Commission's orders are affirmed. In this connection Commission surveys showed that UGI retained more than 58% of Commission-ordered refunds during the period July 1961-July 1964 (R. 517-521).

[2] PGW's Brief in the Fifth Circuit at p. 8.

[3] In a footnote (p. 10, n. 4), the Commission does not deny that the Eighth Circuit's holding in *Northern Natural* is in conflict with the decision below but attempts to reconcile the two cases by drawing certain inferences from a stay order previously issued by the court, *i.e.*, that the refunds "would probably be too small to warrant court proceedings to determine entitlement" (Com. Br. 10, n. 4). Regardless of the accuracy of the inferences drawn by the Commission, the Eighth Circuit's decision disposed of refunds in excess of $7.6 million (215 F.2d at 902).

[4] For some unrevealed reason, the Fifth Circuit failed to discuss the *Northern Natural* case even though it was extensively briefed by the parties.

3. The Commission would have this Court believe that as a result of its orders the refunds at issue[4a] will be paid to "ultimate consumers." This is not true — and the Commission knows it. In this connection, the Commission states that it "remanded the case to its Examiner to consider certain further matters relating to the disposition of the refunds in favor of the ultimate consumer" (Com. Br. 5). However, the remand to the Examiner was for the limited purpose of determining the "appropriate allocation between refunds attributable to Texas Eastern's jurisdictional and non-jurisdictional sales" (R. 768). Since Texas Eastern's non-jurisdictional sales are *de minimis, i.e.,* less than one percent of the total (R. 756), the bulk of the refunds will be paid directly to Texas Eastern's customers without the Commission having taken steps to insure that any of the refunds will reach "ultimate consumers."

The Commission, on three occasions (Com. Br. 7, 8, 14), states that after the refunds are paid to such customers, state regulatory agencies *will have* jurisdiction to decide the ultimate disposition of the refunds involved. This assertion is without legal or factual foundation. As recognized by the Commission in the orders under review (R. 756-57), local regulatory bodies typically have no jurisdiction over direct industrial sales, and even where jurisdiction is exercised the decision boils down to whether the refunds attributable to industrial sales should be retained by the pipeline, the distribution company, or the industrial customer. In no event are such refunds paid to ultimate consumers. As to the balance of the subject refunds, there is absolutely no assurance that under state law local regulatory agencies would or could require the flow-through to

[4a] PGW (Br. 2) and California (Br. 9) erroneously assert that these refunds are the result of producer regulation (PGW Br. 2, 5). More than two-thirds of the refunds result from resolution by the Commission of rate design and rate of return issues in pipeline rate cases (R. 423).

ultimate consumers of refunds received by distribution-company customers if such refunds are not related to increased rates charged the ultimate consumers. See *Straube* v. *Bowling Green Gas Co.*, 227 S.W.2d 666, 671 (Sup. Ct. Mo. 1950).

The foregoing was well known to the Commission, for in its *Forty-Third Annual Report* (1963) to the Congress[5] the Commission stated (at p. 127):

> "NATURAL GAS RATE REFUND SURVEY
>
> "The Commission during the 1963 fiscal year completed the first phase of a survey to determine what happens to the natural gas rate refunds it has ordered interstate pipe line companies to make to their utility customers. The survey, the first of its kind ever undertaken, was designed to provide the FPC with information which would assist in the discharge of its statutory obligation to regulate the transportation and sale for resale of natural gas in interstate commerce in a manner consistent with the congressional intent of protecting the ultimate consumer.
>
> • • •
>
> "In summary, the first phase of the survey revealed that local gas distributors in 36 States and the District of Columbia received approximately $129.2 million; however, information was obtained on only $126.4 million. *Of this amount, ultimate consumers received $73.5 million or 58 per cent.* Seven States reported that more than 90 per cent of the refunds were passed along to consumers, while in two States the distributors re-

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[5] The Commission cites (Com. Br. 4, 14, n. 7) this *Forty-Third Annual Report* as evidencing how it only recently became aware of the problem of the retention of refunds by pipelines. Paradoxically, the Report evidences the problem of retention of refunds by distribution-company customers of such pipelines.

tained all the refunds they received. In three States the amounts refunded were less than 20 per cent.

> *"The principal reason given for the retention of refunds was that the increased charges from interstate pipelines had been absorbed by distributors and not passed along to the ultimate consumers in the first place."* [6]

Thus, the Commission's own survey reveals that a substantial portion of any refunds which Texas Eastern is required to flow through will not reach the ultimate consumer but will only unjustly enrich distribution companies such as UGI Corporation.[7]

This fact exposes the fundamental error in the Commission's claim that its decision "gave full consideration to relevant equitable principles and was fully consistent with this Court's decision in *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577" (Com. Br. 10). The Commission's attempt to embrace *Interstate* and the concept of equitable entitlement is somewhat suspect because in its orders the Commission expressly disavowed any intent

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[6] Emphasis supplied unless otherwise indicated.

[7] In the orders under review the Commission recognized the inequity of this situation, stating (R. 758):

> "One consequence of the existence of unregulated direct sales rates may be that pipeline customers of Texas Eastern — which, unlike Texas Eastern, did not incur any increased costs of their own — will be able to retain portions of the refunds flowed-through to them. If the determination of the appropriate ultimate recipient of the refunds depended upon the relative equities of the two pipelines, it might well be argued that Texas Eastern has a greater claim."

Although the same inequity prevails with respect to direct industrial sales by Texas Eastern's distribution-company customers, the Commission did not seek to take any curative action to insure the refunds will flow to the ultimate consumers or to determine the relative equities of Texas Eastern and its customers to those refunds which will not flow to the ultimate consumers.

to enforce either Texas Eastern's equitable rights or potential consumer rights to any of the refunds, stating (R. 759):

> "The uncertain nature of a pipeline-purchaser's obligations to flow-through refunds to a direct industrial purchaser, under a contract not subject to regulation, is no more basis for permitting Texas Eastern to retain that portion of the refunds than the possibility that local distributor-purchasers, subject to state regulatory authority, might be permitted to retain some or all of the refunds. *Unlike the courts operating pursuant to their equitable powers in cases like Interstate, supra, we have no authority to enforce potential consumer rights in either the direct sales or local distribution situation.*"

In any event, the majority and concurring opinions in *Interstate* reveal that the practical problem which concerned the Court was the fact that *distribution companies* might retain, as they had in the past, rate reduction refunds. Thus, in concurring in part and dissenting in part, Justice Black observed (336 U.S. at 600, n. 6):

> "It is interesting to note the unchallenged assertion in the Government brief that although in *Central States Co.* v. *Muscatine*, 324 U.S. 138, 'this Court required that the way be left open for the ultimate consumers to utilize the remedies, if any, provided by local law, no such proceeding has been brought.' The illusion that state relief is somehow available to the consumers here seems to persist despite the realities that consumers in the *Central States* case, similarly situated to the consumers here, have not received a dime from the 'available' state remedies."

4. Further, it is apparent that the Commission has misinterpreted the equitable distribution of refunds contemplated by *Interstate*. According to the Commission, this Court held in that case that "the intermediate pipeline companies which had paid the high [sic] rates might be

entitled to the fund if their own rates had been unreasonably low" (Com. Br. 11). This interpretation, which Texas Eastern suggests is improper,[8] results from the Commission's position in this case that Texas Eastern is not entitled to the subject refund because of the level of its past rates.[8a] The Commission's interpretation accentuates the conflict between the circuits, for in *State Corp. Comm'n of Kan.* v. *FPC*, 215 F.2d 176 (8th Cir. 1954), the court in reliance on *Interstate* rejected an attempt by a pipeline to claim refunds on the basis of the insufficiency of past rates, stating (215 F.2d at 184):

> "We conclude that to grant the leave to adduce evidence requested by Northern would amount in effect to the initiation of proceedings for recovery of *reparations* by Northern for past insufficiency of rates. *That such is manifestly the purpose of the desired comparison between the expected and the actual realized proceeds of the rates that were established.* That such recovery of reparation is not sanctioned by Section 19(b) and is contrary to well settled law. Interstate Natural Gas Company v. Federal Power Commission supra; Federal Power Commission v. Hope Natural Gas Co., supra."

Similarly, the Commission's action in depriving Texas Eastern of the subject refunds, either because it failed to show its past earnings were unreasonably low or because

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[8] As Justice Douglas noted, the intermediate pipelines "make *no* claim that their rates have been so low that they are entitled to these refunds as a matter of law" (336 U.S. at 582). Thus the issue was not before the Court and the statement in the next sentence that if the issue had been tendered, "the Court would need to resolve it," *Id.*, does not amount to a ruling or a hint as to how such issue might be resolved.

[8a] The Commission (Br. 9) and California (Br. 5) point out that staff evidence in the case indicated Texas Eastern earned a rate of return in excess of 6.25% during the years 1962-1964. Such rate of return is to be contrasted with recent Commission decisions allowing rates of return up to 7.5%. See *Algonquin Gas Trans. Co.*, Opinion No. 571 issued January 19, 1970, 43 FPC .....

its past earnings were too high,[9] violated the prohibition against reparations.

Finally, the Commission recognizes that in *Interstate* this Court held that pipeline companies were entitled to a return of payments made into the fund created by the stay order if they had passed on the rate reductions to their customers (336 U.S. at 582). The Commission argues that Texas Eastern's absorption of the supplier rate increases in this case is not equivalent to the rate reduction situation in *Interstate* because any "change in rates, up or down, exposes a pipeline company's revenue position to Commission analysis and evaluation" (Com. Br. 12). Texas Eastern finds this distinction devoid of any substantive merit, because the revenue position of a pipeline company is constantly exposed to investigation by the Commission under Section 5(a) of the Act. Thus, the essential fact is not whether Texas Eastern's revenue position was exposed to Commission analysis and evaluation at the time it absorbed the supplier rate increases, the disallowance of which resulted in the subject ~~revenues~~ refunds but whether Texas Eastern's customers are in the same position they would have occupied if no rate increases had been filed by Texas Eastern's suppliers. In summary, no matter how the Commission may attempt to disguise the fact, its disposition of the subject refunds cannot be reconciled with the equitable disposition of refunds prescribed by *Interstate*.

5. The threshold question raised by Texas Eastern's petition is whether Section 4(e) of the Natural Gas Act

[9] The Commisison vacillates as to the basis for its decision. At several places it refers to Staff evidence that Texas Eastern earned a rate of return in excess of 6.25% for the years 1962-1964. However, no evidence was presented as to Texas Eastern's earnings for the year 1961, as to which refunds were also applicable. Therefore, the Commission held that Texas Eastern had the burden of proving entitlement to the refunds by showing that its past earnings were unreasonably low. According to the Commission, this holding applied not only to 1961, for which there was no evidence as to the level of Texas Eastern's earnings, but also to the years 1962-1964 (Com. Br. 6, n. 3).

requires the Commission to order the portion of increased rates or charges found not justified paid to the one by whom and in whose behalf the increased rates were paid. The Commission attempts to answer this question by asserting that: "No requirement that the refunds be paid to immediate purchasers is imposed" (Com. Br. 8). However, this dogmatic statement merely begs the question. Section 4(e) by its terms directs the Commission to order a natural-gas company "to refund with interest" that portion of any rate increase found not justified. The plain or common meaning of the word "refund," as well as its legal meaning, is that of restitution, repayment or restoration, *i.e.*, a payment back to one who paid initially.[9a] Thus, when the Act directs the Commission "to refund with interest," it necessarily defines the intended recipient, *i.e.*, the one who paid. The Commission does not dispute this interpretation of the statutory language. Instead, it concluded — and the court below concurred — that the plain meaning of the word "refund" should be disregarded as "plainly inconsistent with the Act's overriding purpose of protecting the ultimate gas consumers" (Com. Br. 8-9). This is a legal conclusion on a question of first impression with far-reaching significance. It is the type of question which should be resolved by this Court.

Any doubt as to the plain meaning and legal effect of the word "refund" in Section 4(e) is removed by the accounting provision, which requires a supplier of natural gas that has increased its rates "to keep accurate accounts in detail of all amounts received by reason of such increase *specifying by whom and in whose behalf such amounts*

[9a] See WEBSTER'S NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 2d ed., unabridged (which was current in 1938 when the Natural Gas Act was passed); 3 BOUV. LAW DICTIONARY, 2856 (Rawles 3rd Rev. Ed.). See also *United States* v. *Wurts*, 303 U.S. 414 (1938); *State of Missouri ex rel Sidenfaden* v. *U. S. Fidelity & Guaranty Co.*, 193 F.2d 47, 57 (7th Cir. 1951).

were paid." The Commission summarily disregards the accounting provision on the ground that "it does not purport to specify who is ultimately entitled to the refunds" (Com. Br. 9). Noticeably, the Commission does not attempt to explain why the statute requires the keeping of detailed records "specifying by whom and in whose behalf" increased rates are paid if it is not intended that any refunds required as a result of the disallowance of such increased rates should be paid back to the one who had paid the increased rates. Certainly, the payment of refunds to the one who paid the underlying increased rates comports better with the language of Section 4(e) than does the alternative of permitting the payment of refunds to any party chosen by the Commission. If it had been intended that the Commission should have the right to select other recipients of refunds, the accounting requirement in Section 4(e) logically would have been extended to include them, or would not have required the keeping of detailed accounts of all increased amounts "specifying by whom and in whose behalf such amounts were paid." In short, the Commission cannot simply disregard the accounting provision of Section 4(e) in construing the scope and meaning of that statutory provision. See *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 23-24 (1968).

6. The Commission does not dispute the fact that certain of the refunds at issue are payable to Texas Eastern under the express terms and conditions of Commission approved contracts for the settlement of supplier rate increases absorbed by Texas Eastern (Pet. 22-24).[10] However, the Commission argues that its approval of the refund provisions of the settlement contracts was not binding be-

[10] In a footnote (Com. Br. 14, fn. 8) the Commission states that Texas Eastern apparently no longer challenges the holding below that Texas Eastern's 1961 settlement did not bar the Commission's flow-through order involved in this case. The Commission's assumption is incorrect. See Texas Eastern's Petition pp. 4-6.

cause the supplier rate increase *proceedings* "were concerned not with the beneficiaries of the refunds, but solely with the lawfulness of the rates there at issue" (Com. Br. 15). This is sheer sophistry.

In the first place, it makes no difference what issues were involved in the supplier rate increase *proceedings* which were settled. In settling any proceeding the parties are obviously free to *contract* with respect to issues outside of the proceeding. Having approved the settlement contracts of the parties providing for the payment of certain of the refunds at issue to Texas Eastern, the Commission is bound by such approval regardless of whether refunds were at issue in the supplier rate increase proceedings which were settled. The Commission admits that "settlements are binding on matters governed thereby" (Com. Br. 14). We submit that matters "governed" by the settlements involved here include all the agreements contained in the settlement contracts rather than the Commission's present day hindsight conception of the issues involved in the *proceedings* settled in 1961 and 1962.

Secondly, the "lawfulness" of rates cannot be settled or determined in a vacuum. Once rate increases filed under Section 4(e) of the Act have been determined to be unlawful, new rates must be established for each class of customers and provisions must be made for the accounting of the portion of the increases found not justified. These and a host of other matters were unanimously retained by the parties in the contracts settling the rate increases filed by Texas Eastern's suppliers which were approved by final Commission orders. Having approved such contracts in their entirety, the Commission should not now be heard to contend that it is free to reverse its approval of all of the agreements contained in the contracts save and except the naked agreement that the rate increases were unlawful. Rate

settlement contracts will indeed become a thing of the past if all provisions thereof are not binding upon the Commission as well as the parties.

CONCLUSION

For the additional reasons set forth herein, Texas Eastern submits that its petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID T. SEARLS
J. EVANS ATTWELL
2100 First City National Bank Building
Houston, Texas 77002

JACK D. HEAD
P. O. Box 2521
Houston, Texas 77001
Attorneys for Petitioner

Of Counsel

LYNN R. COLEMAN
PLATT W. DAVIS III

VINSON, ELKINS, SEARLS & CONNALLY
2100 First City National Bank Building
Houston, Texas 77002